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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE AKRON, CANTON & YOUNGSTOWN Railway Company, the Ann Arbor Railroad Company, and numerous other steam railway companies, all operating west of the Hudson River, and the receivers of certain thereof, appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, Boston & Maine Railroad, and nine other steam railway companies, all commonly known as the New England lines, operating east of the Hudson River, appellees.

No. 646.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Sustaining in all respects the validity of the order of the Interstate Commerce Commission (Tr. I, 137; 62 I. C. C. 513; 66 I. C. C. 196), which increased by 15 per cent the divisions of the New England lines, out of joint freight rates, the District Court (Circuit Judges Hough, Manton, and Mayer all concurring)

filed a full opinion on the merits adjudging all questions against the appellants (282 Fed. Rep. 306). Under the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219), appellants have appealed direct to this court from the order entered June 3, 1922, denying application for interlocutory injunction (Tr. II, 949). The opinion and judgment of this court will, for all practical purposes, be final.

The first report of the Commission resulted in no formal order; nor was it in any sense an adjudication that the divisions to the New England Lines should not be increased. In its conclusions the Commission said (62 I. C. C. 513, 565):

> We shall expect defendants and complainants to promptly submit to us proposed readjustments that will remove the inconsistencies portrayed of record and bring into conformity with the principles of law and equity expressed in the act the divisional arrangements, individually and as a whole, between complainants and defendants. To this end designation by the parties of appropriate committees of qualified personnel is recommended, and we shall expect the appointment of such committees to work jointly in revision of the divisions and to report to us at the end of 90 days after the date hereof the results of their efforts, together with statements of divisions upon which agreement has been reached, as well as those upon which there may not be complete agreement.[1]

[1] Concurring, Commissioners Clark, Chairman, McChord, Meyer, Hall, Daniels, Aitchison, Esch, and Lewis. Dissenting, Commissioners Eastman, Potter, and Campbell.

For the submission of proposed readjustments of the divisions "the record will be held open" (62 I. C. C. 513, 566). "Subsequently, no readjustment having been accomplished, complainants filed a petition for reargument, and this request was granted. It now becomes necessary to re-examine the subject and our former conclusions in the light of this reargument, which was held on November 29, 1921, and in the light of our own further consideration of the law and the evidence" (R. I. 111; 66 I. C. C. 197).

In the second report there *was* a complete adjudication that the divisions to the New England lines should be increased by 15 per cent. The order so directing was the only formal order on that subject ever entered by the Commission.[2]

Whether or not the first report may be characterized as "denying the relief prayed for," and the second as "a new report completely reversing its previous decision," there is nevertheless the outstanding fact that the first report was never followed by any order, and the record was held open.

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[2] Concurring, Commissioners McChord, Chairman, Meyer, Aitchison, Eastman, Campbell, Lewis, and Cox; Potter separately concurring. Dissenting, Commissioners Hall, Daniels, and Esch. Commissioner Clark had been succeeded by Commissioner Cox.

Commissioners McChord, Meyer, Aitchison, and Lewis voted with the majority in each report.

II.

APPELLANTS' POINTS.

The substratum of the whole of the appellants' case which the District Court adjudged against them is—

I. That with respect to divisions each joint rate and each carrier should be dealt with singly.

II. The order directs a *transfer* of revenues.

III. The order was made to meet the financial requirements of the New England lines.

IV. Inadequate evidence.

V. If it authorizes the foregoing the statute is void.

III.

THE LAW PRIOR TO THE ENACTMENT OF THE TRANSPORTATION ACT.

Section 4 of the act to regulate commerce of June 29, 1906, commonly known as the Hepburn Act, amending section 15 (34 Stat. 590), provides:

> The commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

Section 12 of the Commerce Court act, approved June 18, 1910, which amended section 15 of the act to regulate commerce, provides (36 Stat. 552):

> The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line.

In *Tap Line cases*, 234 U. S. 1, 28, this Court, in speaking of the power of the commission to fix divisions to prevent preferences and discriminations to short-line companies which were owned and controlled by the industries, said:

> Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the commission to control.

In *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, 300, this Court, after quoting from the opinion in *The Tap Line cases, supra*, said:

> It is insisted by appellant that the commission was without power to prescribe maximum divisions, as was done by the order of July 29, 1914, because no joint rate was fixed, either by the commission or by the parties, and they had not been afforded an opportunity to agree in respect to the division. This is based upon the view that Sec. 15 of the commerce act as amended (act of June 18, 1910, c. 309, Sec. 12, 36 Stat. 539, 551), contains only two provisions dealing expressly with the division of rates, the first being applicable where the carriers fail to agree among themselves upon the division, the other where the carriers have refused or neglected to establish through routes or joint rates voluntarily. Without stopping to consider whether the circumstances of this case bring it within either of these provisions, we deem it clear that to regard these only is to take too narrow a view of the scope of the section.

In *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 480, 483, this Court again considered the power of the commission to fix allowances or divisions as between the carriers, and in sustaining the order of the commission under the foregoing statutes, said:

> Although it might have dealt with the divisions in the same order, so far as necessary

to prevent undue favoring of the Brewery (*O'Keefe* v. *United States*, 240 U. S. 294, 300–302) it was within the discretion of the commission to allow the carriers to make their own agreement upon the subject, as contemplated by the first paragraph of Sec. 15 of the act (36 Stat. 551), subject to its review.

* * * * *

Recognizing the railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the railway and those lines, it fixed the maximum joint rates, and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically conferred by law upon the commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (act of June 18, 1910, c. 309, 36 Stat. 539; act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the commission has failed or refused to exercise it, or to annul orders of the commission not amounting to an affirmative exercise of its powers. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 292, *et seq.*

In casting the transportation act, the Congress thus had before it the broad judicial interpretation of the previous acts emphasizing the power of the Commission. So guided by satisfactory past expe-

rience the Congress laid down the transportation act on broader lines, and the so-called "divisions paragraph" holds its place aside the other highly important expanding provisions.

IV.

THE TRANSPORTATION ACT.[3]

The transportation act is entitled, "An act" (*a*) "to provide for the termination of Federal control

[3] Paragraphs 3 and 4 of section 13 of section 416 and section 15a of section 422 of the same Act are as follows (41 Stat. 484):

"(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes *any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful* it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any

* * *"; (*b*) "to provide for the settlement of disputes between carriers and their employees;" (*c*) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz, I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

State or the decision or order of any State authority to the contrary notwithstanding."

SEC. 422. The Interstate Commerce Act is further amended by inserting after section 15 a new section to be known as 15*a* and to read as follows (41 Stat. 488):

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time

Inter alia, in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * *

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and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

"properly to serve the public" (41 Stat. 477); "that the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of the United States with adequate transportation" (41 Stat. 488); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491), the Congress of the United States, in enacting the transportation act of 1920, proceeded along comprehensive lines.

It is readily observable that the so-called "divisions paragraph" adds power to the Commission to fix the divisions as between the carriers commensurate with the power granted to the Commission under all of the other sections, all to the end that an adequate system of transportation may be provided.

The transportation act provides (41 Stat. 474, 475):

> SECTION 400. The first four paragraphs of section 1 of the interstate commerce act, as such paragraphs appear in section 7 of the Commerce Court act, are hereby amended to read as follows:
>
> * * * * *
>
> (4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating

through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

The transportation act further provides (41 Stat. 484,486):

> SECTION 418. The first four paragraphs of section 15 of the interstate commerce act are hereby amended to read as follows:
>
> * * * * *
>
> (6) Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudi-

> cial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

As the provisions of the transportation act hereunder consideration are all amendments of the Interstate Commerce Act, it may be fairly assumed that the Congress, in enacting the new provisions, was adding to the power of the Commission to prescribe the divisions just as it was adding to the power of the Commission to raise revenue and for other equally important purposes. The Congress was considering

the transportation system throughout the continental United States as a whole. It accordingly expanded the power of the Commission as a *whole*, and along *all* lines, in order that the law might meet *all* exigencies. To hold that the Congress enacted the broad provisions extending the power of the Commission to raise necessary revenue and for other purposes (*Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad Company* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768) to maintain an adequate transportation system throughout the United States, and then to shear the Commission of its power to fix divisions as between the carriers in the equitable distribution of that revenue would bring about a situation more destructive than if no part of the transportation act had ever been passed.

V.

THE PRACTICE OF THE CARRIERS IN FIXING DIVISIONS OF JOINT RATES ON THROUGH TRAFFIC ON THE PERCENTAGE AND GROUP BASIS IS OLD.[4]

In the instant case the Commission did no more than what the carriers have always done in all

[4] In *Brownsville, Tex., Class and Commodity Rates*, 30 I. C. C. 579, 484: "It appears that in the division of the rates from New Orleans to the differential territory on the line of the St. Louis, Brownsville & Mexico Railway the latter receives 55 per cent of the rate, and upon the haul from points east of New Orleans 63 per cent of the amount apportioned to the lines west of New Orleans."

Here New Orleans was the dividing point.

In *Pacific Fruit Exchange* v. *Southern Pacific Company, et al*, 31 I. C. C. 159, 161, 162, 163: "Reference to the published divisions shows that the divisions via Memphis or East St. Louis to, for example, Virginia cities are 71 per cent to the lines west of the river and 29 per cent east. The

sections. The fixing of divisions on the percentage and group basis has always been recognized. The Commission merely dealt with a practice. It could not well have done otherwise and effectively administered the law.

In *O'Keefe, Receiver,* v. *United States,* 240 U. S. 294, the order required certain trunk line railway com-

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western lines, therefore, out of the $1.15 rate, would get, to East St. Louis or Memphis, 82 cents. Via New Orleans, the percentage to the western lines is 67 per cent, which would result in a rate of 77 cents to the western lines."

In *Grain Rates from Milwaukee,* 33 I. C. C. 417, 420, 421: "The eastern carriers, * * * assert that under the present adjustment the western carriers compound their earnings on more or less of the shipments by receiving the same rate to Milwaukee as applies to Chicago and in addition receiving a division of the reshipping rate. The reshipping rates are divided by deducting 3 cents for terminal charge at the eastern destination and according the western lines 10 per cent of the remainder."

In *Sloss-Sheffield Steel & Iron Co.* v. *Louisville & Nashville R. R. Co.,* 35 I. C. C. 460, 465, 466: "In dealing with the question of divisions we have no doubt that it is our duty to take into consideration all circumstances, conditions, and equities affecting either group of the contending carriers in so far as necessary to enable us to arrive at a fair and reasonable adjustment. It can not be reasonably questioned that because of their strategic position the northern lines possess advantages with respect to this pig-iron traffic which should be recognized.

* * * * *

"We think the estimates of divisional percentages should have been based upon hauls via the direct gateways. Such method would have shown the proportion to the southern lines as 64.7 per cent of the through rates to the 11 destination points above named, and the proportion to the northern lines as 35.3 per cent. The average haul to such points via the direct gateways is 319 miles by the southern lines and 167 miles by the northern lines. The average division of the through rates via the direct gateways prior to October 1, 1914, was $2.29 to the southern lines and $1.25 to the northern lines."

Here the dividing line was the Ohio River.

In *St. Louis, Mo.-Illinois Passenger Fares,* 41 I. C. C. 584, 598, 599: "The terminal company receives as its divisions of the through charges 40 per cent on outbound traffic and 20 per cent on inbound traffic, both passenger and freight. The one-way passenger fare from St. Louis to Peoria, for example, a distance of approximately 170 miles, is $3.25, of which the terminal company receives 40 per cent, or $1.30, for its haul of 7½ miles and the other lines $1.95 for the balance of the distance. The divisions are made on these percentages regardless of the length of the haul."

panies, including the New Orleans, Texas & Mexico, to reopen through routes and publish joint rates to interstate destinations with certain tap lines, including Louisiana & Pacific Railway Company, with which appellant's road had and has a connection, and prohibited any of the line carriers from making to any of the tap lines an allowance or division out of the joint rates in excess of maximum amounts prescribed as follows:

"For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds."

That order embraced the divisions or allowances to all carriers and did not consider specific allowances or divisions for single lines.

In sustaining the order this court said (240 U. S. 303, 304):

> Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this

> a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. It is admitted that distance is an element properly to be considered; but appellant insists that terminal service, the origin of traffic, etc., are more important elements. This is an administrative question. The tap line problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

The junction points on which divisions between the New England lines and the lines operating west of the Hudson River are based, on class and commodity rates, are fully set forth in the first report of the Commission (Tr. I, pp. 84, 85, 86, 87, 88; 62 I. C. C. 554, 555, 556, 557, 558, 559). To illustrate:

> The eastbound rates divide: East of Chicago, 25 per cent; west of Chicago, 75 per cent. The westbound rates divide: East of Chicago, 27.5 per cent; west of Chicago, 72.5 per cent. The east of Chicago proportion of the joint rates divides: To and from Boston, New York Central, 79.4 per cent; Boston & Maine, 20.6 per cent; to and from interior New England points, New York Central, 73.4 per cent; Boston & Maine, 26.6 per cent.

Thus the fixing of divisions on the percentage basis with a basic dividing line, just as rates have always been fixed on the group and percentage basis, was

a universal practice of long standing which was relevant in the instant case. The Commission merely readjusted and increased the divisions on a basis of calculation not unlike that adopted by the carriers in the past. Power hitherto reposed in the carriers was by the statute transferred to and reposed in the Commission. Such has been the basis of practically all legislation concerning the carriers, and with respect to the so-called "divisions paragraph" there is nothing new.

In *Intermountain Rate Cases*, 234 U. S. 476, the order of the Commission was alleged to be of momentous consequence. That order carved the United States into five zones from which commodity rates were fixed on percentage bases to Pacific Coast terminals; that is to say, the rates from Zone No. 1 to intermediate points than to Pacific Coast terminals shall remain the same; that commodity rates from all points in Zones numbered 2, 3, and 4 to points intermediate to Pacific Coast terminals that are higher to intermediate points than to Pacific Coast terminals shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent from points in Zone No. 2; 15 per cent from points in Zone No. 3; and 25 per cent from points in Zone No. 4. All rates so fixed by the order were subject to complaint, investigation, and correction when they conflicted with any other provision of the act.

The order was entered under section 4 of the Act to Regulate Commerce, as amended, which estab-

lished the "hard and fast" long and short haul clause, relief from which could be obtained only by the application to the Commission on a proper showing.

As in the instant case, the foregoing order was assailed, *first*, as beyond the power of the Commission; and, *second*, if within its power then section 4, as amended, was invalid.

Sustaining in all respects the validity of section 4, as amended, and the power of the Commission thereunder, this court, speaking through Mr. Chief Justice White,[5] said (234 U. S. 485, 486, 494):

> * * * *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the commission as a primary instead of a reviewing function. In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law.* This being true, as we think it plainly is, the situation under the amendment

[5] The *Intermountain Rate Cases* brought forth one of the leading opinions of the late Chief Justice. It is listed as such by the former Solicitor General, Mr. John W. Davis, in his article in the American Bar Association Journal for August, 1921.

That opinion recalls what Mr. Justice Buller once observed of the judgments of Lord Mansfield, "Most of us have heard these principles stated, reasoned upon, enlarged, and explained till we have been lost in admiration at the strength and stretch of the human understanding." *Lichbarrow v. Mason*, 2 Term Rep. 73.

is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the commission the right of carriers to seek and obtain under authorized circumstances the sanction of the commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

* * * * *

Let it be conceded that the language relied upon would have the far-reaching significance attributed to it if separated from its context, we think when it is read in connection with the report of which it but forms a part, and moreover when it is elucidated by the action taken

by the commission there is no substantial ground for holding that by the language referred to it was entitled to declare that the fourth section as amended conferred the uncontrolled exuberance of vague and destructive powers which it is now insisted was intended to be claimed. In any event, however, we must be governed by the statute and its plain meaning.

* * * * *

As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. *As we have pointed out, though somewhat modified, the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate-making which was included in the tariffs which were under investigation and therefore we may put that subject out of view.* (Italics ours.)

Throughout appellants' brief distinguished counsel argue, "The order * * * is in favor of the ten New England roads, as a group, against the other roads of the country, as a group, and average conditions override individual rights" (Br. 11), and "the group theory turns the division statute topsy-turvy" (Br. 21).

If the effect of the argument is that the Commission should have treated each of the carriers singly, it follows that it should also have considered rates and

divisions singly; so that the Commission must consider each carrier, each rate, and each division in and of itself.

Pursuing that argument, distinguished counsel say that 256 carriers are named in the order (Br. 63). Assuming that they handle traffic that moves from and to the junctions with the New England lines, to start with there are a large number of carriers on whose lines there must be separate adjustments of single divisions.

It will not be denied that every article of commerce known to the shipping or commercial world is regularly moving into and out of New England on through routes and joint rates over one or more of the lines east of the Hudson and one or more of the lines west.

Coming now to paragraph 6 of section 15 (41 Stat. 484), before it fixes any divisions the Commission "shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated," etc. (Br. 10). If a manufacturer of shoes at Lynn, Mass., has a customer at Fresno, Calif., and the shoes move on through routes and joint rates from Lynn to Fresno, over the Boston & Maine to Rotterdam Junction, New York Central to Chicago, Santa Fe line to Fresno, according to argument of distinguished counsel for appellants, before the Commission may adjust these divisions it must undertake separate investigations of three great trunk-line systems as to the efficiency with which they are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on the railroad property

allowed for and used in the service of transportation, the importance to the public of the transportation service of each, and also which is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one to a greater or less proportion than the others of the joint rate, fare, or charge. The same rule would apply if a train of citrus fruit moved from Southern California to Boston, and so on, *ad infinitum*. Such a course would have compelled the Commission, in the instant case, to have brought before it each division sheet of each joint rate of each carrier in the United States. The division sheets could not have been loaded in the largest freight car.

The words "The Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received *by the several carriers*" by no means precludes the Commission from following the usual practice in such matters, that is, prescribing, reducing, or increasing rates or divisions on the percentage and group basis. In ordering that the New England lines shall receive 115 per cent of their present divisions was a direct compliance with the mandate that the Commission shall by order prescribe "the just, reasonable, and equitable divisions" to be received "by the several carriers" comprising the New England lines. In short, the argument that before the Commission may make its order effective it shall deal specifically with each rate and division with respect to each

line singly would render paragraph 6 of section 15 as ineffective as if it were repealed *in toto*.

To undertake separately to examine divisions of each joint rate over each carrier would be the equivalent of examining separately the leaves of the forest. In his dissenting opinion to the first report Commissioner Eastman said (Tr. I. 94; 62 I. C. C. 566):

> Throughout the majority report runs the criticism that complainants ask revision of their divisions "as a whole." The thought is that the law requires us to attack the problem *atom by atom*, withholding action until we have the necessary evidence to analyze separately the many thousands of joint rates and determine finally their just and equitable divisions. I am unable to accept this view of our power and duty. (Italics ours.)

Completely rejecting the proposition, Circuit Judge Manton, speaking the unanimous opinion of the District Court, said (282 Fed. Rep. 311, 312):

> The petitioners attack the order of the Commission on the grounds that the Commission exceeded its authority in fixing primary divisions east and west of the Hudson river gateway, without at the same time fixing the subdivisions to be received by it of the two or more railroads participating in the haul on either side of the gateway, and that the Commission exceeded its authority in the group treatment of divisions; that is, it is claimed that it should not have been

given the broad consideration of the conditions east and west of the gateway, but instead a consideration of each route independent of other routes. It is stated that the particular divisions found by the Commission are therefore unjust, unreasonable, inequitable, and unduly preferential, and prejudicial as among the respective parties thereto; also that the order is invalid because it was made in contemplation of further revision of divisions, and that the order is invalid because it is based upon an imperfect structure of divisions. The attack is generally made that there was not a bona fide exercise of the Commission's power to fix divisions, but an attempt to transfer money to the New England roads without statutory authority, and that therefore the constitutional rights of the petitioners have been invaded.

* * * * *

We think that section 15 (6) in effect does not require the Commission to make an independent conclusion as to each carrier and as to the division of each joint rate. If it considers together the various carriers and various divisions and reaches a conclusion equally applicable to such carriers and divisions, its order is valid and enforceable under the act. That this procedure and practice was followed before the Transportation Act of 1920, see the Eastern Case, 20 Interst. Com. Comn. R. 275; the Western Case, 20 Interst. Com. Comn. R. 324; Railway Comn. of Texas v. A., T. & S. F. Ry., 20 Interst. Com. Comn. R. 468.

In *Ex parte No. 74* the New England lines were included within Group I with the common consent of all parties. The order fixing the groups and percentage increases of rates allowed respectively to each have been sustained by this court against orders of the State Railroad Commissions to the contrary. *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad Company* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768.

That "the disproportionate needs" of the New England lines formed a substantial part of the evidence upon which the 40 per cent increase was allowed in Group I is also a fact to be considered in the determination of this appeal. *In Ex parte No. 74* (58 I. C. C. 247) the Commission said:

> While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to *the disproportionate needs of the New England lines* makes it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines. (Italics ours.)

In *New England Divisions*, 66 I. C. C. 202, the foregoing language was carried over into the second report, in which attention was called to the fact that no readjustment had been accomplished under the first report and it had become necessary for the Commission to re-examine the subject and its former conclusions (66 I. C. C. 197).

In its first report the Commission said (Tr. I, 89, 62 I. C. C. 559) "The proceeding is essentially an outgrowth of *Ex parte 74*."

Commissioner Potter, who concurred in the second report, entered his vigorous dissent to the first report. Among other things, he said (Tr. I, 106, 107):

> The value of the New England lines was considered and included by us in Ex Parte 74 in determining the aggregate amount to be paid by shippers for the use of the group transportation machine. The low earnings of the New England lines were considered in determining the amount of additional income to be raised to make up the required aggregate compensation. The shippers are now paying on the basis of value of the New England lines and as compensation for their use. After including the value of these lines, to determine the aggregate amount to be raised as compensation for all of the lines in the group, we translated this amount into a percentage rate increase on all traffic moving within all parts of the group. The effect of this action by us was, because of the difference in traffic density, to transfer to the other lines a part of the compensation which, under the statute was to be raised, and which we started out to raise for the New England lines. It is now our duty to correct this unsound result and direct these earnings back to the New England lines, where they belong under the statute and by virtue of our action which created them. To do less is not only to perpetuate gross injustice, but to sanction a result which,

it seems to me, is not in harmony with the spirit of the law. As I see it we are not asked to give to the New England lines something that belongs to the others, but to end a misappropriation in violation of law, by the other lines, of funds that belong to the New England lines.

* * * * *

We can require that the New England lines be given that part of the increased earnings of the group, which was authorized for them by us in Ex Parte 74, because of the lower earnings of these New England lines. We can correct the carriers' methods so that the scheme of the transportation act to raise moneys to compensate for the use of all parts of the group machine shall not be defeated, after the moneys have been raised, as a result of our action in fixing different percentage increases on freight and passenger traffic and of the different ratios as between freight and passenger traffic on the different lines. The record shows that before Ex Parte 74 was decided it was appreciated that a general percentage increase throughout the group would not accomplish the results aimed at, but would result in injustice to the New England lines, and that division changes would be necessary to accomplish justice. The plain duty of the carriers was to make these changes. It can be calculated that as a result of the recent world readjustment the New England lines have been required to carry a disproportionate burden in the matter of fuel costs, labor, and in other respects. These increased

burdens should be borne by all lines equally and this disproportionate burden of the New England lines should be distributed over the others in the group, which can be done by a mere change in division percentages. Other principles can definitely be announced for prompt application by the carriers.

A percentage increase of all divisions to the New England lines is not offensive, because it would result in increasing certain divisions which are now too low. The divisions of rates are not in themselves the ultimate end. They are the means by which fair relations between the carriers are established in the aggregate. If the relation resulting from the divisions as a whole is fair, no harm will be done, if, temporarily, particular divisions are made too high or too low. An adjustment unsound in detail may be required as a temporary expedient if in its general result it is fair and can be changed from time to time as consistency may require. Our report in Ex Parte 74 is a precedent for this course.

As the *Wisconsin Rate Case* and the *New York Rate Case* were the outgrowth of *Ex Parte 74*, so is the *New England Divisions Case* an outgrowth, and so will many other succeeding cases be like outgrowths.

Rates which are paid by the public on the order of the Commission should be applied in their distribution for the benefit of the public and as intended at the time the increased rates were ordered. On that subject the Commission should have a voice. The enormous sums estimated to have accrued from

the order entered in *Ex parte 74* may not now be expended by the carriers in any way that they choose without regard to the authority of the Congress and the Commission.

To repeat Commissioner Potter's statement, it is "a misappropriation in violation of law, by the other lines, of funds that belong to the New England lines."

On this subject the learned district court, speaking through Circuit Judge Manton, said (282 Fed. Rep. 313):

> The question before the Commission was the apportionment of the joint fund in proportion to the services rendered. In the past the joint railroad service was largely measured by mileage performed by the participating carriers. This was then the way of expressing the relative burden incurred. It became apparent that other things measure the burden besides mileage, and it was this increasing appreciation of these factors that led to the provisions of section 15, subd. 6, indicating that mileage alone was not to be considered. That the Commission was given consideration to these other factors of operation is explained in its report. The public interest is the leading characteristic of the Transportation Act; as said by the Supreme Court in the Wisconsin Case, "A new departure," imposing "an affirmative duty on the Interstate Commerce Commission to fix rates or take other important steps to maintain an adequate railway service for the people of the United States." The act makes it the Commission's duty to

> find a way, despite the complexity of the subject, to carry out the new mandate of Congress, and makes it clear that the matter must be dealt with in a comprehensive way.

The purpose of the statute is clearly expressed that when the power was reposed in the Commission to authorize these enormous increases which the public must pay, in the Commission was also reposed the power to control their distribution and expenditure. When the Commission is empowered to authorize rates to allow a fair return upon the aggregate value of the railway property (Sec. 422), the Commission is simultaneously empowered to veto wasteful expenditures in the improvident construction of new lines or branches. (Sec. 402, par. 18.)

Arguments have been advanced at different times and places which tend to convince that the carriers are the main parties whom the acts to regulate commerce were designed to protect. When the Commission allowed the increase of 40 per cent in the freight rates in Group I in *Ex parte No. 74*, the railway companies which collected, and which have continued to collect, those rates no more represent the public interest than do the communities which they serve and the shippers who pay. The latter are entitled to have a transportation system, of which the New England lines are a part, adequately maintained through the powers of the Congress and the Commission.

The argument that paragraph 6 of section 15 added nothing to what the Congress had already enacted in previous statutes is the same as that advanced in the *Wisconsin Rate Case* and overruled (257 U. S. 586):

> Counsel for appellants, not able to satisfy their meaning by the suggestion of any other discrimination to which they apply, are forced to the position that the words are tautological and a mere repetition of "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If "undue, unreasonable, or unjust discrimination against interstate or foreign commerce" are tautological, why are they followed by the phrase "which is hereby forbidden and declared to be unlawful"? To accompany a meaningless phrase with words of such special emphasis would be unusual.

In enacting paragraph 6 of section 15 it is not to be presumed that Congress did a vain thing by writing a whole paragraph into a comprehensive statute which added nothing to existing law.

This case by no means stops at paragraph 6 of section 15. The latter merely constitutes one branch of the comprehensive scheme of legislation and the whole is to be considered together. Single paragraphs may not be considered separately and apart

from the rest of the transportation act any more than divisions, rates, and carriers may be considered singly, separately, and apart from anything that pertains to the transportation system as a whole.

If the order is sufficiently far-reaching to effect the entire transportation system, then the judicial power, in approaching the subject, should keep the entire transportation act and all of the carriers subject thereto in full view at all times, in order that the development of the transportation system and the law applicable thereto may move forward at once and together.

As in *Ex parte 74*, the Commission is open for carriers to make separate complaints of specific divisions.

In *Wisconsin Rate Case*, 257 U. S. 591, this court said:

> It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intra-

state rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

The appellants applied for and received the increase in *Ex parte No. 74*. The increase was fixed at 40 per cent for Group I which included the *New England lines* (although appellants actually received about 37 per cent, Tr. I, 56, 62 I. C. C. 526). In the district court and in this court appellants (by the same distinguished counsel who represents them here) stood for the validity of the order in *Ex parte No. 74* and for the validity of all of those sections of the transportation act under which that order was entered (*Lehigh Valley* v. *Public Service Commission*, 272 Fed. Rep. 758; *State of New York* v. *United States*, 257 U. S. 591).

In its entire history the Congress never passed an act in which the sections were so closely interlocked and dependent each upon the other as in the case of the transportation act. That must be so as the Congress was considering "the transportation needs *of the country*" (*supra*, 11).

Appellants should not be allowed to stand for the validity of and claim the benefits under an act constructed as the transportation act and subsequently "assert the unconstitutionality of its limitations" (*Grand Rapids & Indiana Ry.* v. *Osborn*, 193 U. S. 17; *Daniels* v. *Tearney*, 102 U. S. 415; *Baltimore & Ohio* v. *Lambert Run Coal Co.*, 267 Fed. Rep. 776).

Again, distinguished counsel suggest that the order of the commission rests on the principle that the strong shall support and carry the weak. This suggestion would seem to put out of view the provisions to the effect that the shipping and traveling public must support and carry them all and that it acted well its part in submitting to the increases in *Ex parte 74*. The rehabilitation was but commenced then. The law certainly did not contemplate that at that point the fat should devour the lean. An administrative body with power to take the testimony and find the facts, such as the commission, and which functions under a statute sufficiently elastic to allow quick decisions and a fairly liberal discretion, may more nearly maintain a "just, reasonable, and equitable" ground to the end that an adequate system of transportation may be provided than any other machinery under our system of government. "Transportation conditions are not static; the oppressor of to-day may to-morrow be the oppressed." (*Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 568.)

Again it is observable that "in so prescribing and determining the divisions of joint rates, fares, and charges, the commission *shall* give due consideration, among other things," etc. That provision is mandatory. If the commission had failed to obey that mandate its order might be subject to challenge on that ground. The challenge here, however, is very general in its terms, and is mainly, first, that the order attempts to deal with divisions as a whole

and with groups of railroads, and not with any particular divisions found to be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as among the respective parties thereto; and, second, that the order attempts to take moneys from one so-called group of carriers and to transfer the amounts to another so-called group, upon grounds of public policy.

The order is not separately attacked by any carrier subject thereto. The complaint before the commission was brought by numerous carriers against a greater number. The record discloses that the testimony before the commission relates to the situation on the lines of the carriers in Eastern Rate Group. The order of the commission was in line with the form of the complaints and proceedings and the nature of the testimony. The main petition here is filed by forty-four carriers as petitioners and follows the case along the lines of the complaint, the hearing, the testimony, and the report and order of the commission. No carrier has taken a stand in a separate suit against the order, and in view of the posture of the case it is too late to expect the court now to deal with it in a manner differently from that with which it was dealt by the parties and the commission, namely, as a whole, instead of small fragments or threads. Any other course than the one followed would result in the annihilation of the transportation act, as its execution may not be carried out on any other basis. "And it may be that there can not be an accommodation of all interests in one

proceeding," a proposition advanced by the Central Railroad Company of New Jersey, but that does not invalidate the order of the Commission (*I. C. C.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88, 108.)

VI.

THE EVIDENCE IS ADEQUATE.

The argument that the evidence is inadequate to sustain the order (Br. 60, 73) can not be maintained.

Counsel refer to 12 companies as to which there is no evidence on the subject of "existing divisions" (Br. 62); and to 8 companies as to which the Commission had no evidence showing what the divisions were; and to 14 companies (some of which are mentioned in the other lists) as to which "there is no evidence in the record" (Br. 63).

It is further stated with all of the emphasis of italics that of 256 carriers "as to not one of them was the Commission advised as to the amount of a single one of the divisions which it condemns" (Br. 63).

This is but a reargument of the proposition that the law required the Commission "to attack the problem *atom by atom*." Moreover, an exhaustive discussion of these divisions appears in the Commission's first report (Br. I, 84–88; 62 I. C. C. 551, 558).

Rejecting that argument *in toto*, Circuit Judge Manton, speaking the unanimous opinion of the District Court, said (282 Fed. Rep. 309):

> The revenue requirements for the New England roads were proved and considered in considerable detail. The value of the prop-

erty investment, the fixed charges of the railroads, the resulting deficits and profits during a period of years, were all submitted to the Commission, as were the accounts of the Boston & Maine, the Central Vermont, and the Rutland Railroads. There was evidence of the revenue and property investment per unit of traffic and the net operating income of the New England railroads. There was testimony offered as to the terminal characteristics, the operating handicaps, and the diversity of routes and diffusion of traffic in the New England territory. Such matters as the freight station density, the junction density, and the branch line and the yard density, and the character of the traffic, were all considered in the evidence offered. There was sufficient offered to support an argument of a poorly balanced traffic, and the showing was made that the traffic of the New England roads is spread over a multitude of low-density secondary and branch lines resulting in a relatively short haul. There was also evidence as to the amount of snowfall and the winter conditions which handicapped railroading. The requirements and cost of fuel, together with the wage problem, was considered in considerable detail. We do not deem it necessary to the disposition we shall make of this case to narrate in this opinion the detail of proofs as to each of these various considerations.

A tabulation was submitted showing the alleged claim of the inadequacy of the present divisions as compared with local and New England interline rates and as compared with

> the cost of service. There were given the percentages which the divisions of the joint rates consisted of, local rates, east and west of the New England junctions, and the relations of the divisions to the mileage prorate east and west. The inadequacy of the present divisions, as indicated by their relation to local rates or mileage prorate, when considered in connection with the length of the haul and character of the service, is thus demonstrated. These tabulations of the several petitioning New England roads were shown.

It is calculated that the order will add to the revenues of the New England lines not exceeding $7,500,000 per year in round numbers (Tr. I, 119, 120; 66 I. C. C. 206).

The argument that the order appropriates that sum from the carriers operating west of the Hudson and arbitrarily transfers it to the New England lines was rejected by the District Court in the following words (282 Fed. Rep. 313):

> Nor may just complaint be lodged against this order because it is temporary and provisional, and represents a transfer of revenue pending the Commission's reaching a conclusion on the subject of divisions. The Commission, in the report made, clearly indicates its willingness and desire to correct such injustice as might be found to arise in detail in connection with the comprehensive manner in which the Commission decided it ought to deal with the subject.

VII.

CONCLUSION.

The entire argument of appellants may be summed up in the language of Mr. Chief Justice White in *United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 416, "* * * that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation."

The decree of the District Court denying the application for interlocutory injunction should be affirmed.

H. M. DAUGHERTY,
Attorney General.
JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY, 1923.

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No. 646.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE AKRON, CANTON AND YOUNGSTOWN RAILWAY COMPANY ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND BOSTON AND MAINE RAILROAD ET AL., APPELLEES.

SUPPLEMENTAL MEMORANDUM BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

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For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

JANUARY, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE AKRON, CANTON AND YOUNGSTOWN Railway Company et al., appellants,
v.
THE UNITED STATES OF AMERICA, THE Interstate Commerce Commission, and Boston and Maine Railroad et al., appellees.
No. 646.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL MEMORANDUM BRIEF FOR THE INTERSTATE COMMERCE COMMISSION REPLYING TO SEPARATE BRIEFS FOR THE JERSEY CENTRAL RAILROAD COMPANY AND THE ERIE RAILROAD COMPANY.

The briefs on behalf of the Jersey Central Railroad of New Jersey (hereinafter called the Jersey Central) and the Erie Railroad Company discuss anew various questions which are already covered in our original brief. We shall not rediscuss these questions, but shall confine ourselves to the special points in these briefs.

THE JERSEY CENTRAL BRIEF.

Page 8.

In a footnote on this page counsel refers to *Interstate Commerce Commission* v. *C., B. & Q. Ry. Co.*,

186 U. S. 320, as support for the proposition that the findings in the first report of the Commission should be given weight. He quotes the following language from page 340:

> We find it in reason difficult to treat the statements made after the reargument as substantive findings of fact overthrowing the facts stated in the first report.

The court continued in the same sentence as follows:

> for this reason: In the passage which we have already excerpted from the report of the Commission announced after reargument it will be seen that it declared that the previous findings were modified to the extent necessary to make it clearly appear that the terminal rate of $2 independently considered had been found unquestionably to be reasonable, and there is no expression in the report on the reargument tending to show that it was the purpose to modify in other particulars the findings as previously made.

In other words, the court held that the Commission did not intend to modify its findings except in so far as it expressly so stated. In the present case the conclusions of the second report, to which appellants object, undoubtedly supersede the first report to whatever extent they are inconsistent therewith.

Page 28.

Counsel for the Jersey Central errs in stating that in the Wisconsin case the Commission's order "was

in part set aside." The court merely indicated that if the order had been based exclusively on the power over intrastate rates which the Commission had prior to the transportation act, the order would have been too broad, because the evidence that the border intrastate rates were prejudicial to persons and localities interested in interstate commerce was not typical of interior intrastate rates.

Page 39.

Counsel in endeavoring to meet the situation that his argument would create a condition where the Commission could not practically administer the statute, suggests that the Commission could have followed the course which it subsequently followed in the *Missouri & North Arkansas case*, 68 I. C. C. 47, and in the *Kansas City, Mexico & Orient case*, 73 I. C. C. 319. We venture the prediction that if and when these cases come before this court it will be found that the representatives of the different carriers will be insisting in those cases that the Commission ought to have followed the plan adopted in this case of reaching approximately a uniform conclusion which would not unduly disturb existing relationships.

Our position is that Congress has not confined the Commission to any single course of action, either that which it pursued in this case or that which it has pursued in other cases. Congress provided that divisions should be just and reasonable and it left the Commission to adopt the method which in the Commission's judgment was best adapted to accomplishing justice in the particular case.

Page 42.

Counsel states that there are three main gateways through which traffic jointly participated in by the Jersey Central and the several New England carriers may pass—Mechanicville, Maybrook, and Jersey City—and that there was "no evidence whatever before the Commission as to the percentage or amount of divisions received by the Jersey Central of joint class rates between points on the Jersey Central and points on" the Central Vermont Railway, the Central New England, the Maine Central Railway, and the Rutland Railroad via the Mechnicville gateway or the Maybrook gateway. This merely means that the subdivisions of such rates received by the Jersey Central were not shown, and does not mean that the divisions east and west of the Hudson River gateway were not shown. The Jersey Central does not reach Maybrook except through the Lehigh & Hudson and does not reach Mechanicville except through the Delaware & Hudson.

As to rates between points on the Jersey Central and points on the New England lines mentioned above,[1] the record shows the divisions accruing west of Mechanicville or Maybrook to the Jersey Central and its connection, the Lehigh & Hudson or the Delaware & Hudson, but does not show the subdivision between these companies. (Exhibits 45, 46, 52, 64.) Therefore the statement has no significance unless the statute prohibits the Commission from examining and fixing the main divisions at the Hudson without at the same time examining and

[1] As to rates to or from points on the Rutland Railroad, the divisions are shown east and west of Chatham, the Hudson River gateway through which the traffic moves.

fixing all the subdivisions east and west, although the subdivisions are not in controversy. We have fully covered this question in our brief.

This is also true of the statement on pages 43, 44, that there was no evidence as to the percentage or amount of divisions received by the Jersey Central out of any joint class rates applying between points in New England and points located on other trunk lines connecting with the Jersey Central, the Jersey Central in such cases being an intermediate carrier. The divisions east and west of the river were shown in typical instances.

It will be observed that no claim is made that the Jersey Central subdivisions are not shown in connection with rates between points on the Jersey Central and points on the New Haven and the Boston & Maine via the Maybrook gateway. As a matter of fact, Charles L. Ewing called as a witness by the Jersey Central introduced evidence (Exhibits 90 and 91) showing completely the percentage divisions received by the Jersey Central of rates between all points on the Jersey Central from or to which business moves via Maybrook, and all points on the New Haven and the Boston & Maine. These exhibits as to such rates show not only the subdivisions received by the Jersey Central separately but also the total divisions east and west of the Hudson River gateway.

About nine-tenths of the business interchanged between the Jersey Central and the New England lines is interchanged with the New Haven and the

Boston & Maine. (Exhibit 12.) A substantial part of the tonnage interchanged between the Jersey Central and the New Haven and Boston & Maine moves via the Maybrook gateway. (Record, pp. 604, 615.) All traffic originating at or destined to points on the Jersey Central west of Allentown goes through the Maybrook gateway. (Record, p. 615.)

Witness Ewing testified that there were fourteen bases of percentage divisions between the Jersey Central and the New England lines, and that he had made a study of them all. (Record, pp. 611, 612.)

He fully developed, as stated above, two bases of divisions, (1) the basis applicable to business interchanged with the New Haven via Maybrook, and (2) the basis applicable to business interchanged with the Boston & Maine via Maybrook. (Record, pp. 608 to 611, incl.) It is certainly to be presumed that the witness, after having made a study of all fourteen bases, selected as the two to be developed fully those which were at least as favorable as any other to the position which his company was trying to sustain in the proceedings.

Although he testified that the bases shown in his exhibits "can not be said to be representative of Central New Jersey percentages with New England carriers or carriers via other routes" (record, p. 607), he showed that other bases might be tested by those he put in evidence. When asked what "from his study of all these bases * * * and viewing the thing and testing the divisions solely on these standards of mileage prorate and 50-mile

blocks rates," was his opinion as to all of the percentage divisions on the fourteen different bases, the witness said "that they are all extremely liberal to the New-England carriers; *that the results, as tested by the 50-mile scale, are practically the same as in the two exhibits we have just analyzed.*" (Record, p. 612.) (Italics ours.)

The brief continues that divisions via Jersey City were shown only for 5 per cent of the total number of divisions. This is an untrustworthy manner of expressing the matter because it gives as much importance to the divisions of a rate to or from an unimportant point on which little, if any, business may move as it does to a rate on which a very heavy volume of business may move.

The division situation with reference to rates in which the Jersey Central participates was very fully shown. We refer the Court to Exhibits 43, 52, 64, 81, 90, 91, 92, 93, 94.

Page 47.

Counsel seeks to combat the proposition that competition is an important factor which tends to equalize divisions via different routes. In doing this he offers three reasons which are sufficiently indicated by the following reply thereto:

(1) It is true that at the present day the shipper has the right to route his traffic, but the route which he selects is largely influenced by the solicitation of the carriers. That is, the shippers are solicited to, and largely do, route the traffic in response to the

requests of the traffic solicitors of the several interested carriers. For this reason the competitive feature remains important. (See reference to testimony of President Pearson of the New Haven at p. 52 of our original brief.) The right of the shipper to control the route first appeared in the Mann-Elkins Act of 1910. The record shows that the divisions between New England and the rest of the country were established long before that and therefore at a time when carriers had unrestricted control of the routing of all traffic delivered to connections. Thus the competitive principle had practically unlimited sweep when the divisions were established and, as the record clearly shows, had a strong equalizing tendency. The fact that the relationship between the divisions, which grew out of competition, has not been disturbed to this day indicates that for all practical purposes the influence of competition continues notwithstanding the shipper's right to route the traffic.

It remains true that the Commission is entitled to exercise its discretion with respect to the propriety of avoiding the creation of greater disparities between divisions via different routes than already exist, for reasons stated in our original brief.

(2) It is quite true that an important consideration with the carrier is so to route the traffic as to secure for itself the long haul. For these reasons a New England carrier receiving traffic would naturally prefer to secure the longest possible haul by routing it via the gateway producing that result, provided that,

everything considered, including the balance of traffic moving in each direction, and the divisions received by the respective gateways, this turned out to be to its best interests. Counsel for the Jersey Central, however, overlooks the fact that exactly the same principle applies equally in the opposite direction and that carriers west of the Hudson will be disposed to route traffic going into New England so as to get for themselves the longest haul, and thus they will select the gateway best adapted to accomplish that result. This condition has always obtained. Yet our original brief shows that the competitive feature was of the greatest importance in determining the amount of the divisions, and it appears that the divisions for the later routes that were successively established were without substantial exception made with reference to the divisions theretofore established by older routes.

(3) Counsel points out that the divisions are not the same via the different gateways and takes for example the rate between Boston and Philadelphia and shows that via Mechanicville the division east of the Hudson is 12.1 cents, the lines west of the Hudson getting 23.4 cents, while via Jersey City the line east of the Hudson gets 25.1 cents as against 10.4 cents west of the Hudson. It is inevitable that this should be the case. A reference to the map attached to the Jersey Central's brief, or to the map attached to our original brief, will show that via Mechanicville the New England part of the haul is much shorter (187 miles) and the haul west of the Hudson is much longer (365 miles); whereas the con-

dition is reversed via the Jersey City gateway (New England haul 229 miles, west of Hudson haul 99 miles). Such considerations are bound to influence the division of the revenue. They always have done so and were of course active during the period when the divisions were established, and yet the record shows that competition was then an important factor in equalizing the divisions. It must be remembered that the Commission in this case adopted the plan which would not disturb the long standing relationship existing between divisions on routes via the different gateways.

Page 50.

The Jersey Central urges that the operating factors shown in the record conclusively demonstrates that the Jersey Central's divisions should have been increased rather than diminished, and that those factors would not support any inferences whatever to the contrary, and that this proposition is so plain that it becomes a question of law upon the basis of which the Court should declare the Commission's order void.

But counsel's argument clearly illustrates the wisdom of the principle adopted by this Court that it will not undertake to weigh a vast mass of intricate evidence upon transportation problems which are committed primarily to the Commission for its decision.

There is no basis whatever for a legal pronouncement that the factors mentioned by counsel must lead inevitably to the conclusion that the Jersey

Central's divisions can not be diminished. There are many relevant factors which counsel has refrained from mentioning and exactly opposite inferences from those he suggests are to be drawn from many of the factors which he does mention.

An outstanding fact of the greatest importance is that a leading characteristic of traffic on the Jersey Central is the enormous anthracite coal traffic which originates on that road, gives great density of traffic per mile and per car, admits of handling in heavy trainloads, and is generally supposed to be traffic of exceptional value to the carrier. Of course, there is no such traffic in New England. The divisions on anthracite or other coal were not dealt with in the Commission's order at all. Another highly important form of traffic handled by the Jersey Central is the traffic moving between New England and points west of the Jersey Central, as to which the Jersey Central is an intermediate carrier, and as to which, therefore, it does not have to sustain the burden of terminal cost at either end. This is a condition which does not largely obtain in New England. Both of these conditions greatly influence the comparatively short haul on the Jersey Central, and yet they do not indicate an exceptionally high cost on account of that short haul.

Many of the factors which the Jersey Central has carefully selected and placed in its Appendix A will be found on analysis to call for exactly the opposite inferences from that insisted upon by the Jersey Central.

For example, a comparison of "miles operated" with "ton-miles revenue freight 'thousands'" will show that on the Jersey Central the density of traffic is 3,618,000 ton-miles per mile of road, while on the New Haven it is 1,611,000 ton-miles per mile of road, and on the Boston & Maine it is 1,433,000, and on the New England roads together it is 1,189,000. This shows a far greater density of traffic on the Jersey Central.

It appears that the "net ton-miles per loaded car-mile" are 33.1 on the Jersey Central as compared with 23, 23.3, and 23.5 on the New Haven, the Boston & Maine, and the New England roads as a whole, respectively. This emphasizes a decidedly greater economy of operation on the Jersey Central.

The "demurrage assessed per million ton-miles of freight" is 137.21 for the Jersey Central, as against 252.74, 195.6, 206.67 for the New Haven, the Boston & Maine, and the New England roads as a whole, respectively, thus indicating the much greater amount of detention of equipment in New England.

The "average miles between agency stations" appears to be 4.1 miles on the Jersey Central as compared with 3 miles on the New Haven, thus indicating, despite a much less density of traffic, a very much greater burden for maintenance of agencies on the New Haven than on the Jersey Central. There is also a disparity in the same direction on the Boston & Maine, with 3.5 miles between agency stations, and on the New England roads as a whole,

with 3.8 miles between agency stations. This is emphasized still further by the percentages which show that on the Jersey Central only 54 per cent of all the stations are agency stations, while on the New Haven and on the Boston & Maine 92 per cent of all the stations are agency stations. This strongly corroborates the general contention of the New England lines that their agency expenses in proportion to the traffic handled are exceedingly high as compared with the roads west of the Hudson. This percentage for the New England roads as a whole was 77.

Some of the factors selected by the Jersey Central which appear at first blush to be favorable to its contention lose this favorable significance when considered in the light of the traffic. For example, the fact that the train speed is less on the Jersey Central than in New England is obviously explainable by the fact that it handles an enormous coal traffic which naturally moves in heavily loaded trains at low speed, thus getting the heavy-train loading which has always been understood to be one of the greatest efficiencies which could be realized in railroad operation.

Likewise, the reasonable inference from the fact that the percentage of empty car-miles to total car-miles is greater on the Jersey Central is that the coal cars which handle the enormous coal traffic move empty back to the mines.

The average freight revenue per loaded car appears, according to the Jersey Central's statement, to be substantially less than in New England, but this showing omits to consider the fact that the New England roads have to haul the traffic a much longer distance than the Jersey Central has to haul it, and if this were allowed for the result would be the other way.

With such factors strongly indicating that the Jersey Central to a large extent has the same characteristics as the other roads west of the Hudson, and very important operating advantages as compared with the New England lines, there was ample basis for the Commission to apply its general conclusion to the Jersey Central as well as to all the other railroads west of the Hudson and to refrain from postponing the granting of general relief until a separate inquiry could be prosecuted as to peculiarly unfavorable operating results which the Jersey Central insisted had arisen during 1920, which everyone knows was a highly abnormal year. But even in that abnormal year it will be noted that the results for September, October, and November, which were after the expiration of the Government six months' guaranty, showed for the Jersey Central a distinctly better situation and trend than for the New England lines.

During these months the operating ratios of the Jersey Central as compared with the operating ratios for the New Haven, the Boston & Maine, and all New England lines, respectively, were as follows:

1920	Jersey Central.	New Haven.	Boston & Maine.	New England roads.
September	81.28	88.10	93.95	89.76
October	89.55	91.18	98.78	93.16
November	93.63	96.41	110.72	98.98

The rapid improvement in the results of operations on the Jersey Central, as compared with the results of operations on the New England lines during the months following the termination of the Federal guaranty period, appears strikingly in Exhibit 186, from which we show the following:

Ratio of Net Railway Operating Income to Property Investment.

Road.	Ten months 1920 (annual basis).	Three months, September, October, and November (annual basis).
Jersey Central	[1] 3.85	3.44
New York, New Haven & Hartford	[1] 2.99	.40
Boston & Maine	[1] 4.37	[1] 3.44
All New England Roads	[1] 3.72	[1] .52

[1] Deficit.

That the 10 months' showing of the Jersey Central was a temporary condition only is demonstrated by the fact that for the year ending October 31, 1919, which was the year upon which the increases in rates granted in Ex Parte 74 was based, the increase in revenue required by the Jersey Central was only 26.41 per cent, whereas the increase re-

quired by the New England roads was 47.44 per cent. (Exhibit 172.) As soon as the guaranty period ended, the immediate beginning of recovery by the Jersey Central, as shown above, enabled it to earn a net railway operating income of 3.44 per cent, while the New England lines were still showing a deficit of 0.52 per cent.

Page 59.

Counsel says that the Commission proceeded in this case very much as it did in *Florida East Coast Line* v. *United States*, 234 U. S. 167, in so far as the lack of material evidence is concerned. In that case it appeared that from points of origin in Florida to base points in Florida, the East Coast already had carload and less-than-carload rates on citrus fruit and vegetables, while the Atlantic Coast Line and the Seaboard Air Line had only "any-quantity" rates on those commodities. The Commission pointed out that as a result of the establishment of carload rates from the base points to the final destinations in other states, there had come about a new method of handling traffic from the points of origin to the base points, in that formerly the traffic had been loaded in small quantities at the points of origin at the carriers' expense, but subsequently it had come to be loaded at such points of origin in carload lots at the shippers' expense.

On the strength of this evidence the Commission established carload and less-than-car-load rates from points of origin on the Atlantic Coast Line and Sea-

board Air Line to the base points, and since the rates so established were lower than the carload and less-than-carload rates theretofore established by the East Coast, the Commission reduced the rates on the East Coast to the same lower basis. But the evidence as to the change in the method of shipment from the points of origin, whereby loading in carload lots at the shippers' expense had been substituted for loading in small quantities at the railroads' expense, had been confined exclusively to the Atlantic Coast Line and Seaboard Air Line, and in fact necessarily confined to those two railroads, because theretofore the East Coast already had established carload and less-than-carload rates, which made allowance for the fact that carload shipments were loaded by the shippers and less-than-carload shipments were not. The result was that there was no evidence whatever to show that the rates on the East Coast were unreasonably high, and by reason of the fundamental difference in the construction of the rates, the evidence as to change in conditions on the Atlantic Coast Line and Seaboard Air Line did not admit of any inferences whatever bearing upon the East Coast situation. In such circumstances the evidence on the Atlantic Coast Line and Seaboard Air Line could not in any way be typical with respect to the East Coast.

The court held that the order was void as to the East Coast. But manifestly the case is fundamentally different from the present case. In that case the sole object of the order, as to the East Coast, was the change in the rates and the sole evidence was

evidence which could not by any possibility have any relation to that road. The degree of failure of evidence was 100 per cent. In this case there was an abundance of evidence regarding the Jersey Central, both as to the division of rates east and west of the Hudson in which the Jersey Central participated, and as to operating and other conditions affecting the cost and value of transportation, etc., over its line.

In addition to evidence relating to the Jersey Central separately, the Commission had before it a great mass of evidence relating to the trunk lines generally, including the Jersey Central. (Exhibits 1 to 15, 16 to 29, 112 to 118, 121 to 124, 131, 132, 191, 201.)

THE ERIE BRIEF.

The Erie brief concludes with the statement that the right of a participating carrier to its just proportion of the through rate is entitled to the same protection as is the joint right of all the participating carriers to exact a reasonable rate from the shipper. The application of this principle necessarily sustains the validity of the Commission's order. Even prior to the Transportation Act the Commission dealt with the total rate in a comprehensive way, looking at the conditions of competing carriers and at the average of those conditions, and its conclusions so arrived at did not violate the rights of any particular carriers affected thereby. Prior to the Transportation Act the Commission could have reduced the rate from Boston to Chicago on the basis of a compre-

hensive view of all the different routes. Likewise the Commission could have reduced the rate from Jersey City to Chicago upon such a view of all the different railroads, and the Erie could not have complained because it had not been separately considered and had a separate rate fixed for it. Yet it now complains that the Commission can not reduce the compensation it receives from Jersey City to Chicago on traffic coming from near England unless it is considered separately from all other roads. In other words, it insists upon a much greater protection for its divisions than it would insist upon for its rates.

We urge that the question what is just compensation to a carrier for its part of the service involved in a joint haul is no more sacred than is the question of what is just compensation for the total service.

In considering the Erie brief it is important to bear in mind the precise concrete effect of the statute if applied as urged by the Erie. It claims that it must be considered separate and apart from every other railroad west of the Hudson; that its operating results are unfavorable; and that therefore its divisions must not be reduced even though divisions via other routes may be reduced. For example, upon the basis of the Erie's premises, it might develop fom such a separate consideration of the Erie that wile the divisions of the Pennsylvania Railroad frm the Hudson River to Chicago should be reduced by15 per cent, the Erie divisions for exactly the same serice should not be reduced at all. Yet it appears in evidence that the Erie divisions have in fact

been based on the Pennsylvania divisions in the past. The Erie claims in effect that if its divisions are touched at all a substantial disparity must now be created between its divisions and those of the Pennsylvania; in other words that although the service the Erie renders can be no more valuable than the service the Pennsylvania renders, the Erie as a matter of law is entitled to say 15 per cent more compensation therefor, while the participating New England line although rendering the same service in either case must take say 20 per cent or 25 per cent less if the traffic happens to go by the Erie than if it happens to go by the Pennsylvania.

We deny that Congress has ordained that any such result must arise as a matter of law. What the Commission is seeking to arrive at is a conclusion as to what is just and reasonable compensation to the Erie for the service rendered west of the Hudson River on through traffic. Since Congress has not sought to confine the Commission to a single narrow and exclusive procedure in arriving at a conclusion as to what is just and reasonable compensation for the part of the joint service west of the Hudsor River via any route, and has not prohibited th Commission from considering comprehensively an factors which would bear upon that question, t follows that the various contentions of the Eie should be addressed to the Commission and notto the court. But it would be strange if the Commisson should feel impelled to ignore in its consideratio of the question competitive and other practical aspets

which the carriers themselves have considered and acted upon and which the Commission itself has habitually considered and acted upon when dealing with total rates.

Moreover, in the broad view which the Commission has manifestly taken of this subject, it is clear that it has not overlooked certain significant facts regarding the Erie. The density of traffic on the Erie, including the Chicago & Erie, is over 5,000,000 tons per mile of road as against 1,226,000 on the New England roads. The average haul for the Erie system is 215 miles as against 100 miles for the New England lines. Of the total freight traffic of the Erie more than 50 per cent is products of mines (the most profitable traffic a railroad can have), while only 17 per cent of the New England tonnage consists of such traffic.

The Erie Brief shows that for the year ending June 30, 1920, the Erie System's net railway operating income was 1.64 per cent on the property investment, as against 1.37 per cent for the New Haven, and 1.40 per cent for the seven New England roads, and that the relative showing would be far more favorable to the Erie if its investment account were not greatly in excess of the investment account of the New Haven roads. Defendant's Exhibit 117 shows that the Erie's investment per mile was $216,043, as compared with $188,857 for the New Haven, $96,246 for the Boston & Maine, and $108,430 for the New England lines, whose divisions were increased, as a whole.

The Commission pointed out in its report (p. 116) that "the investment of the New England roads is relatively low per mile, and that there is evidence sustaining the soundness and validity of this investment, while no similar evidence has been offered with reference to the other carriers." The Erie does not claim that it has offered any evidence to sustain the soundness of its very high investment cost per mile of road.

CONCLUSION.

It will not be overlooked that of all the railroads west of the Hudson River upon which the Commission's order operates, the Jersey Central and the Erie are the only railroads which appear to claim that their conditions are of such a character as to put them in the same class with the New England roads, and therefore as to exempt them from any reduction of divisions, and indeed to justify increased divisions. In other words the effect of their claims is that these two roads are outstanding exceptions to the other roads west of the Hudson. If this is the case (and an analysis of the operating factors tends to indicate that it is by no means the case and that certainly the Commission within the limits of its discretion would be warranted in deciding that it is not the case) resort to the saving clause of the Commission's order and report would be the appropriate way for avoiding injustice. Certainly the granting of relief to the New England lines ought not to be held in abeyance until such exceptional case could be separately dealt with.

In addition to all this is the controlling consideration that Sect. 15 (6) does not exact that an exclusive cost basis separately applied as to each carrier must be the sole standard for ascertaining reasonable compensation for the part of a through service performed by a carrier participating therein. This would exclude controlling considerations of competitive value of service, encouraging the movement of traffic by more costly routes, etc., etc., all of which the Commission is entitled to consider, as is shown in our original brief.

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WASHINGTON, D. C., *January, 1923.*

No. 645.

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Supreme Court of the United States,

OCTOBER TERM, 1922.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND THE BOSTON & MAINE RAILROAD COMPANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

ALEXANDER H. ELDER,
For THE C. R. R. Co. OF N. J., *Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

I.

Preliminary Statement.

The main brief of the appellants states why the report and order of the Interstate Commerce Commission in the so-called "New England

Divisions Case", 66 I. C. C. 196 (Rec. 110-38) which was sustained by the District Court for the Southern District of New York in *Akron, Canton & Youngstown Railway Company, et al.* vs. *United States,* 282 Fed. 306, should, in its entirety, be set aside.

This brief is filed on behalf of The Central Railroad Company of New Jersey, which will be referred to hereafter as the Jersey Central. Its object is to illustrate more fully than seemed appropriate in the main brief, the arbitrary character of the order from the standpoint of one of the appellants. While each appellant is differently circumstanced, the order, it is believed, is fundamentally defective as to each. The case of the Jersey Central is, in essence, identical with that of the other appellants, but certain of the facts, as to it, called for by Section 15 (6) of Interstate Commerce Act as amended (41 Stat. L. 484) were more fully laid before the Interstate Commerce Commission and they serve to illustrate concretely the arbitrary character of the Commission's order.

Although the Jersey Central is one of the smaller of the appellants, the New York, New Haven & Hartford Railroad, which is the largest New England carrier, interchanges more tonnage with it than with any of the other trunk lines except the Pennsylvania (Exhibit 10). Moreover, three-fourths of all the tonnage inter-

changed by the Jersey Central with the New England lines is interchanged with the New Haven (Exhibit 12). It follows that the divisions of joint rates in which the Jersey Central is chiefly interested are those with the New Haven and that the Jersey Central is one of the two chief connections against whose divisions the New Haven complained to the Interstate Commerce Commission. *The divisions of joint rates as between the Jersey Central and the New Haven are therefore of very substantial importance in considering the validity of the Commission's order.*

II.

Specification of Errors.

The District Court erred:

(1) In refusing to hold that the order of the Commission as amended is arbitrary and therefore invalid because it sets up groups of carriers and decides issues affecting the several carriers interested upon evidence relating solely to such groups.

(2) In refusing to hold that said order is arbitrary and therefore invalid, because based wholly upon group statistics which are incompetent and irrelevant in determining the equitable and just divisions to be received by the several carriers interested.

(3) In refusing to hold that said order is arbitrary and therefore invalid, because it

is a temporary and provisional order unauthorized by the statute and leaves the adjustment of divisions in the only manner provided in the statute for future determination.

(4) In holding that said order as affecting The Central Railroad Company of New Jersey and the other defendants severally named in the order, is valid notwithstanding that there was no legal evidence before the Commission as to the divisions of those companies out of the great preponderance of joint rates affected by the order.

(5) In holding that there was "typical evidence" in said proceeding to justify said order as against The Central Railroad Company of New Jersey and the other defendant carriers severally.

(6) In holding that the enforcement of the said order will not take the property of The Central Railroad Company of New Jersey as well as of the other petitioners and other carriers without due process of law and for public use without just compensation in violation of the Fifth Amendment.

(7) In refusing to hold that said order was not authorized by the statute.

(8) In refusing to grant the interlocutory injunction prayed for.

III.

The Essential Questions Defined.

It is well settled that the Commission's findings of fact, *when properly arrived at,* are final. It is equally well settled, that when such findings are not properly arrived at or when the legal effect of the evidence, upon which such findings rest, is disputed, a question of law for the courts arises (*I. C. C.* v. *L. & N. R. R. Co.,* 227 U. S., at 91-2; *Fla. East Coast Ry. Co.* v. *U. S.,* 234 U. S. 167; *U. S.* v. *L. & N. R. R. Co.,* 234 U. S. at 321; Wisconsin Rate Case, 257 U S., 563. This appeal presents only such questions of law.

The briefs filed by appellees in the lower court and the opinion rendered by the lower court warrant the conclusion that the main points upon which this appellant relies for showing that the Commission's order is invalid, were not clearly understood. For that reason, we desire, at the outset, to point out certain misconceptions of our position that arose in the prior proceedings so as to make clear the precise questions that we deem to be controlling.

FIRST. In the brief filed on behalf of the Interstate Commerce Commission in the lower court, it was stated:

> "One contention permeating petitioners' argument is that Section 15 (6) in effect pre-

> vents the Commission from dealing with the divisions of joint rates on through traffic at such a natural dividing line as the Hudson River, unless at the same time it examines all the countless subdivisions of those joint rates on both sides of that line."

That the lower court accepted this as an adequate statement of our position is shown by the following sentence in its opinion (Rec. 944-5),

> "The petitioners attack the order of the Commission on the grounds that the Commission exceeded its authority in fixing primary divisions east and west of the Hudson River gateway without at the same time fixing the sub-divisions to be received by it (each) of the two or more railroads participating in the haul on either side of the gateway."

This presents a substantial understatement and misconception of our real complaint. If the Commission had merely taken the joint rates applicable from points on the New Haven Railroad via the Jersey City gateway, thence via the Jersey Central to Bound Brook and thence over various routes to points beyond and had undertaken to fix only the divisions to be received out of such rates by the New Haven without determining what divisions the Jersey Central and the other participating carriers should receive, we submit that there would have been a serious question as to whether the

Commission had complied with Section 15 (6). That, however, is not the main question involved here. The Commission did precisely that thing, but it went a great deal further. It not only dealt with all of the joint class rates applying to and from New England via the Jersey City gateway in connection with the Jersey Central, but (1) with the joint class rates applying via the Jersey City gateway via many routes in which the Jersey Central does not participate, (2) with the joint class rates applying via the Maybrook gateway via many routes in which the Jersey Central does not participate, (3) with the joint class rates applying via the Albany and other gateways, in the great preponderance of which the Jersey Central has no interest whatever, and moreover, in making a horizontal change in all the divisions of all these joint rates, it took into account (4) the operating, revenue and traffic statistics of a great many railroads whose circumstances are wholly different from those of the Jersey Central, and (5) such statistics related not merely to the traffic moving under the joint rates that were to be divided, but to the transportation activities of those carriers generally, and (6) the statistics above described were then scrambled into territorial averages and as the second report shows, the inferences upon which the order rests were drawn solely from these average statistics (Rec. pp. 113-6). We desire to emphasize that

these are the facts upon which we base our contention that the Commission's group treatment of divisions was arbitrary. In other words, we need not rely, as the lower court seemed to assume, upon the contention that the Commission erred merely in not going further when it had ordered 15% of the joint revenue transferred from the carriers west of the Hudson River to the carriers east of the Hudson River. Our contention is that the Commission should not have ordered any change in divisions after it had concluded, as shown by its first report* (Rec. p. 94), that,—

> "* * * the record affords no foundation upon which might rest a valid prescription by us of divisions"

and that,—

> "Any attempt to prescribe a blanket increase of divisions as here sought * * * would override the plain mandate of law" (Rec. p. 93).

SECOND. We desire in another respect to make the essential basis of our appeal unmistakably

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* Throughout this brief references will be made to the first report of the Commission. If it be suggested that the findings in the Commission's first report should not now be given weight attention is invited to the following conclusion adopted by this Court, under similar circumstances, in *Interstate Commerce Commission* v. *C. B. & Q. Ry. Co.*, 186 U. S. at 340:

> "We find it in reason difficult to treat the statements made after the re-argument as substantive findings of fact overthrowing the facts stated in the first report."

In the present case, as in the case above cited, no additional testimony was offered after the Commission's first report.

clear. The Commission in its second opinion frankly admits (Rec. 118) that:

> "Manifestly also if a horizontal increase is made before this revision takes place, the result may be to leave certain divisions too high and others too low."

Now, if the Commission's order, as it affects the Jersey Central, merely made some of its divisions too low, while leaving others too high, yet in view of its alleged temporary character and the saving clause attached to it, it might be urged that, while technically open to attack, the order in substance and effect was within the legislative intent. Our attack on the order does not rest on any such narrow ground. The particular point upon which we are here insisting is that when there is *no evidence whatever* tending to show *that any of the divisions* of the Jersey Central are *too high* and such evidence as bears on the problem all tends to show that its divisions, *as a whole*, with the New England roads are too low, the Commission cannot lawfully issue a blanket order reducing all of said divisions upon evidence which is in no way typical of the situation affecting the Jersey Central. The position of the Jersey Central is not merely that some of the divisions fixed by the Commission are too low, as the Commission admits, but that the divisions of the Jersey Central as fixed by the Commission are *as a whole* inequitable to it. It is our further contention that for the reasons stated by this Court

in *Florida East Coast Railway Co.* v. *U. S.*, 234 U. S. 166; *I. C. C.* v. *Stickney*, 215 U. S. 98, and in *Wisconsin Rate Case*, 257 U. S. 563, the Commission cannot lawfully reduce certain divisions received by one carrier out of joint rates solely upon evidence regarding other divisions and other carriers and that the mere allegation that such evidence was typical does not convert *manifestly* arbitrary action into due process of law. If such a proceeding were sanctioned, then the nominal hearing which was granted to the Jersey Central in this case was a mere empty formality, because the Commission might, just as intelligently and just as equitably, have reduced the Jersey Central divisions by 15% without the formality and expense involved in holding hearings. Indeed, if the real object of the Commission's second opinion and order was to transfer to the New England carriers the approximate sum of $7,500,000.00 as appears fairly inferable from the Commission's second opinion (Rec. 119) then it is apparent that while the hearings were nominally held under Section 15 (6) of the Commerce Act, the order is not in truth based upon that statute, but upon some quasi-legislative powers which the Commission conceives that it possesses outside the statute.

THIRD: The lower court in its opinion (Rec. 947) held:

> "The question before the Commission was the apportionment of the joint fund in pro-

> portion to the services rendered * * *. The public interest is the leading characteristic of the Transportation Act * * *. The Act makes it the Commission's duty to find a way despite the complexities of the subject to carry out the new mandate of Congress and makes it clear that the matter must be dealt with in a comprehensive way."

This statement invites inquiry as to precisely what right of the appellants is deemed to be invaded by the Commission's order. The position of this appellant is that, prior to the effective date of the Commission's order, there was in effect as between it and each of the New England carriers, a series of contracts providing for the division of all joint class rates upon the basis of stated percentages. These agreements were in the form of express contracts, the validity of which had never been questioned prior to August 27, 1920, the date on which the appellees filed their original complaint with the Interstate Commerce Commission (Rec. 18). Section 208 (*b*) of the Transportation Act, 1920 (41 Stat. L. 464) contained the following provision:

> "All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed

> by mutual agreement between the interested carriers or by State or Federal authorities, respectively."

In view of the above facts, it is the position of this appellant that the Commission's order unwarrantably modified its contract rights. The effect of the Commission's order has been to force this appellant without due process of law, to relinquish property rights which were entitled to protection under the Fifth Amendment. We do not at this time desire to discuss the question how far divisions may be affected with a public interest and thus become subject to reasonable public regulation. Our point is that the Commission and the lower court erred in assuming that joint revenue constitutes a fund which Congress or the Commission may divide *solely* with regard to the public interest. Our further point is that a carrier has an unquestionable property right in an established basis of dividing joint rates which right cannot be lawfully disturbed by administrative order without strict observance of due process of law.

FOURTH. In the brief filed for the United States in the court below, the following paragraph appears on pages 31-32,—

> *"The order is not separately attacked by any carrier subject thereto.** The complaint

* Italics throughout this brief are ours.

> before the commission was brought by numerous carriers against numerous carriers. The record discloses that the testimony before the commission relates to the situation on the lines of the carriers in Eastern Rate Group. The order of the commission was in line with the form of the complaints and proceedings and the nature of the testimony. The petition here is filed by forty-four carriers as petitioners and follows the case along the lines of the complaint, the hearing, the testimony, and the report and order of the commission. *No carrier has taken a stand alone against the order*, and in view of the posture of the case it is inconceivable that the court should now deal with it in a manner differently with that with which it was dealt by the parties and the commission, namely, as a whole, instead of small fragments or threads. Any other course than the one followed would result in the annihilation of the transportation act, as its execution may not be carried out on any other basis."

If this merely means that the Commission's order, if arbitrary as to any of the appellants, must be treated as invalid as a whole, we take no exception to it. If, however, it implies that because of some provision of the Transportation Act or because of the history of this proceeding under the Transportation Act, relief from the order can

not be granted to The Central Railroad Company of New Jersey, considered as a separate entity as distinguished from the group of carriers against whom the order is addressed, then we most earnestly dissent. The Central Railroad Company of New Jersey is before this Court as a citizen owning property, and asserting its individual rights under the 5th Amendment to the Constitution. The Commission's order is addressed to it individually. It was represented by counsel and filed a separate brief in the proceeding before the Commission and also in the proceeding before the lower court. Its position is that notwithstanding any statute which Congress has enacted or may enact, it has the right as a separate entity to have its distinct property interests accorded the protection of the Fifth Amendment, and the fact that the Commission may have treated it as part of an artificial group of carriers, instead of qualifying or submerging its separate and distinct rights under the Fifth Amendment, merely stamps the action of the Commission as arbitrary and in disregard of those rights. In other words, this carrier desires to emphasize that throughout this proceeding it has insisted that its rights and interests were not and could not be merged with those of other carriers unless the merging, even though alleged to be done in the public interest, was accomplished by

due process of law, which would involve just compensation to it for the taking of its property.

It has seemed proper in view of the misconceptions that arose in the lower court to define our position with some care. If we have succeeded it will be clear that the three main questions raised by this appeal, so far as the Jersey Central is concerned, are as follows:

A. Is a blanket order setting up two groups of carriers and fixing the divisions of joint rates as between those two groups without giving any consideration to the varying circumstances of the respective carriers, authorized by the statute?

B. Is a divisions order made to meet the "financial needs" of one carrier at the expense of another, authorized by the statute?

C. Is the order, as to the Jersey Central, supported by evidence or arbitrary and in violation of the 5th Amendment?

IV.

The order is based upon an erroneous construction of the statute and is therefore arbitrary and unlawful.

The law upon which the Commission's order purports to be based, is as follows:

> SECTION 15. "(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges,

applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular par-

> ticipating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge" (41 Stat. L. 474).

One of the most obvious facts in this whole proceeding is that Congress could not possibly have anticipated that the Commission would apply the statute as it has done in this case. This proceeding is unprecedented in its sweep.

As the Commission said:

> "In no proceeding heretofore brought under the provisions of the Interstate Commerce Act have we been called upon to exercise powers so broad as those upon which complainants here rely" (Rec. 89).

Divisions controversies in the past have almost invariably been brought by one of the short lines. Congress, in enacting Section 15 (6), was acting at the request of the short lines. Its primary purpose was to grant relief to the short lines. This proceeding, however, was brought by seven trunk lines against over 600 railroads. The Commission's order purports to modify the divisions of practically all joint class rates applying between New England and other points in the United States. It is elementary that a statute should be construed in harmony with the legislative intent. The language employed by Congress

is clear, and its intent is clear, and neither conflicts with constitutional principles.* It is apparent, therefore, that no serious question is raised as to the constitutionality of the statute *per se*.

Moreover, there is no real difference of opinion as to what Section 15 (6) literally means. The Commission, after carefully analyzing it, held that,—

> "Any attempt to prescribe a blanket increase of divisions * * * would override the plain mandate of the law" (Rec. 93),

and that is precisely our view. According to the lower court, however, there is something, some place in the Act, which made it "the Commission's duty to find a way" (Rec. 947) to issue orders like that here attacked. The Commission, yielding to such a view, first decided to issue a so-called "temporary" order with a so-called "saving clause" and then notwithstanding the view it had previously expressed as to the proper construction of Section 15 (6), it had no choice but to rest said order upon that section. If this gelded construction of the statute were sound, the statute would, we submit, violate the Fifth Amendment. However, for reasons that will now be pointed out, such a construction is unsound.

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* It is significant that Commissioner Esch who was on the House Committee which reported the Transportation Bill and who was therefore best informed as to the Congressional intent dissented from the Commission's final report.

(a) The Group Theory Is Unsound.

The Commission's order is necessarily based upon the theory that, under Section 15 (6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually.

Before proceeding to argue from this premise, it may be well to make clear that it is well founded. The Commission's opinion and order will speak for themselves in this regard. In its original opinion (Rec. p. 90) the Commission held,

> "We are bound, under the statute to determine whether divisions properly in issue justly, reasonably and equitably compensate *each carrier* relatively and *per se* for the service it performs in the joint haul under joint rates, fares and charges. Our determination must be predicated upon a consideration of all the various pertinent factors including the ability or disability of *the several carriers* to adequately, economically and efficiently meet their common carrier obligations. In the final analysis the just measure of divisions is the reasonable and equitable share of the revenue earned under the rates to be divided which *each carrier* should receive."

In its second opinion, the Commission discards this definition of its views and instead proceeds upon the theory (Rec. p. 112) that,

> "Both the legislative history and the provisions of that Act make it clear that the pur-

> pose of Congress in this legislation was broader than the mere regulation of individual railroads. Congress was endeavoring to assure an effective transportation for the nation. The principle was recognized that the various carriers, while independently owned, are nevertheless to a large extent interdependent and that they owe a duty to one another in the public interest."

It seems manifest from this change of view as well as from the parts of the opinion shown in the record at pages 113-16, that the findings of the Commission on which the order rests are based exclusively upon the "group theory". Moreover, the uniform percentage revision of divisions prescribed by the order itself, shows that the carriers were dealt with solely as two groups without regard to the fact that some of the carriers in the group west of the Hudson River are now in the hands of Receivers, while the condition of the others varies widely. There can be no doubt, therefore, that the Commission, having first concluded that the New England carriers *as a group* needed revenue worse than the other eastern carriers *as a group,* was guided wholly by such group comparison in deciding that the divisions of the Jersey Central should be reduced. The lower court, after noting our contention "that the Commission exceeded its

authority in the group treatment of divisions" approved of such action by holding:

> "We think that Section 15 (6) in effect does not require the Commission to make an independent conclusion as to each carrier * * *" (Rec. p. 946).

We come then to the question,—What is there in the statute to justify this group theory? A glance at the divisions statute makes clear that instead of containing any direct or indirect reference to such a group theory, the law provides with painstaking care for a *due* consideration of the rights and equities of each individual carrier.

Moreover, the divisions section is not only silent as to such a group theory but it has numerous expressions which are inconsistent with any such theory. Thus when Congress directed the Commission to consider "the respective operating expenses" affecting "the several carriers" it employed language which was necessarily inconsistent with the group plan. Again, when Congress directed the Commission to make due allowance for "whether any particular participating carrier is an originating, intermediate, or delivering line" it used language necessarily inconsistent with a plan by which the Commission, for the purpose of fixing divisions, divides all carriers into two groups, for obviously, if all carriers are divided into two groups and

made the subject of a blanket order such as is here involved, no allowance whatever is made for the fact that certain of the carriers are primarily intermediate rather than originating or delivering carriers. In other words, the Commission cannot possibly give recognition to the three classes of carriers enumerated when it deals with all carriers as two groups. **The group theory is, therefore, inconsistent with the express language of the statute.**

Furthermore, the group theory is inconsistent with the fundamental purpose of the Transportation Act to render possible again the successful private ownership and operation of railroads. It would readily be recognized as purely communistic if the Interstate Commerce Commission had selected the prosperous roads of the country on the one hand and the poor roads of the country on the other hand, and on the basis of average statistics for these two groups had reduced the divisions of all the prosperous roads and increased the divisions of all the poor roads 15%. Yet, what the Commission has done in this case is even more repugnant to the Fifth Amendment to the Constitution, for the Commission here has arbitrarily set up two groups, one of which is not even warranted by geographical considerations(*) and in one of which groups there are

*The New England railroads geographically include the Bangor & Aroostook, the Boston & Albany, the Grand Trunk, and the Canadian Pacific as well as the five roads included in the New England group dealt with in the order.

poor as well as prosperous roads. Then, without regard to the needs of the individual carriers in the group west of the Hudson River, the Commission has undertaken to reduce the divisions of each of these carriers 15%, although some of them were in the hands of Receivers. Thus, while purporting to deal with these carriers primarily upon a consideration of their relative financial needs, the Commission has not even followed this standard, but instead has dealt with the Receivers of the Missouri and North Arkansas Railroad precisely as it has dealt with the most prosperous road west of the Hudson River. Such a construction of the statute, we submit, was never contemplated by Congress. In adopting it the Commission has not only ignored the sound principles announced in its first opinion, but it has ignored the specific requirements of the statute and what is perhaps more grave, it has overlooked the constitutional limitations upon which the successful private operation of railroads is wholly dependent.

The Commission, as well as the lower Court, sought justification for the blanket order here involved in the practice the Commission has followed of authorizing horizontal rate increases (Rec. pp. 117-118). It is submitted, however, that the fixing of rates and of divisions bear no analogy to each other. The right asserted by carriers in a rate case is the common law right to a

reasonable return, as the condition of performing a public service. The right asserted in a divisions case is not against the public. Whether or not the public interest is effected by the divisions of joint rates, it is clear that the issue in a divisions case is primarly a private one. It is in form a complaint by one carrier against another carrier. When a carrier asks to have its divisions increased it does not question the adequacy of the rates. For the purpose of the divisions case it acquiesces in the rates as reasonable. It merely asks for its equitable share of such rates. In a general rate case the rate level fixed provides liberal earnings for some carriers, while it provides lean earnings for others, and Congress contemplated this result when enacting "the recapture clause". In a divisions case, however, no such possibility was contemplated or provided for by Congress. The duty imposed upon the Commission as to divisions is to "prescribe the just, reasonable and equitable divisions * * * to be received by the several carriers". It is submitted, therefore, that the practice which the Commission may have followed as to general rate cases has no significance whatever in determining its statutory authority in the fixing of divisions.

Another form of this argument is that since Congress expressly authorized the Commission, in fixing rates, to deal with the carriers in groups it granted implied power to fix divi-

sions by groups. Let us examine this suggestion. Congress dealt with both rates and divisions in the Transportation Act of 1920. In Section 15*a*, paragraph 2 (41 Stat. 488), it directed the Commission to so adjust rates that the carriers *"as a whole"* or in *"groups"* should earn *"an aggregate"* income equal to a fair return on their *"aggregate value"*. The divisions section Section 15 (6) was enacted contemporaneously. Congress employed totally different language in authorizing the Commission to fix divisions. It painstakingly specified rules as to fixing divisions by which the equities of *"the several carriers"* in joint revenue should be determined. From the language employed the intent of Congress seems unmistakable. Congress manifestly had in mind that, while as between the carriers and the public rates might be fixed from the standpoint of the carriers as a whole, yet in dividing joint revenue as between participating carriers, it must respect the constitutional rights of the several carriers to have their joint revenue divided on just and equitable principles in the light of their respective claims. Congress, therefore, expressly directed the Commission, as to rates, to deal with the carriers in groups and in the aggregate because their private interest, as well as the public interest, seemed to justify a common rate level, but, as to divisions, it directed the Commission to deal with the carriers individ-

ually because their respective, conflicting and individual rights and equities was the very subject matter primarily involved. *Thus, this group theory when analyzed destroys itself, because it serves to emphasize that Congress, at the same time that it authorized the Commission to group the carrier for rate purposes, deliberately and expressly directed the Commission to deal with them individually in adjusting their divisions.*

However ingeniously counsel may argue as to the implications arising from the other amendments of 1920, we still have confidence in the doctrine that Congress is deemed to have meant what it **expressly** said. When Congress authorized the Commission to prescribe just and equitable divisions and directed it in so doing to give "due consideration" to "the *respective* operating expenses, etc." affecting "the *several* carriers", and also to consider "whether any *particular participating carrier* is an original, intermediate, or delivering line", no principle of statutory construction can justify the Commission in legally high jumping this clearly stated statutory rule and substituting therefor the arbitrary and unauthorized group rule on which it has alone acted. As the Supreme Court said in *Caminetti* vs. *U. S.*, 242 U. S., at 490,

> "But, as we have already said, and it has been so often affirmed as to become a recog-

> nized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, * * * In other words, the language being plain and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

The conclusion is that the group theory on which the order rests is unwarranted (1) because it is not authorized by the statute, (2) because it is squarely inconsistent with the express terms of the statute, (3) because it is repugnant to the purpose of Congress to render possible again the successful private operation of railroads, and also to the constitutional limitations on which the whole institution of private property rests, and (4) because Congress, while treating the carriers in groups for rate purposes, at the same time deliberately and plainly directed the Commission, in fixing divisions, to deal with the carriers individually. Since the Commission has no powers except those conferred by the statute, it follows that its order is invalid.

The present case is the first one in which this Court has had occasion to review the Commission's understanding of the powers conferred upon it by Section 15 (6). In two other pertinent cases, however, this Court has reviewed the Commission's understanding of the Transportation

Act. In *The Central Railroad Company of New Jersey, et al.*, v. *United States, et al.*, 257 U. S. 247, the Commission's claim that the Transportation Act had impliedly enlarged its powers under Section 3 was disposed of by the following statement:

> "Neither the Transportation Act, 1920, Feb. 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed in this respect the purpose or scope of Section 3."

Again, in the *Wisconsin Passenger Fare Case*, 59 I. C. C. 351, the Commission, acting upon its conception of the increased powers granted to it by Section 13 (3, 4) as amended by the Transportation Act, undertook to reduce all of the intrastate passenger fares in Wisconsin. In *Wisconsin Rate* case (*supra*), the Commission's order was in part set aside for reasons which have such a direct bearing on the present proceeding that the following quotation from the opinion seems peculiarly in point:

> "First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston & Texas Ry.* v. *United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible

injustice can be avoided by a saving clause allowing any one to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the *Shreveport* case (*Houston & Texas Ry. Co.* v. *United States, supra*), Sec. 34, I. C. C. 472; 41 I. C. C. 83; *East Texas R. R. Co.* v. *R. R. Commission,* 242 Fed. Rep. 300; *Looney* v. *R. R. Co.,* 247 U. S. 214. In *Illinois C. R. R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, 508, this Court indicated its approval of such practice which was adopted by the Commission. 49 I. C. C. 713. Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.

"The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois Central* cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the State to border points. But this order is not so restricted. It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travellers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that

> this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, can not give the order validity."

It is a singular circumstance that in sustaining the Commission's order in the present case, the lower court quoted the first paragraph which is quoted above, but appears to have overlooked the second paragraph, which, it is believed, is the one peculiarly applicable to the decision in this case.

Indeed, a careful consideration of the first and second decisions of the Commission suggests that the explanation of the extraordinary order here attacked is that the Commission misunderstood the views of this Court as expressed in the *Wisconsin* case regarding the use and abuse of the typical-evidence rule. It is manifest that the Commission undertook to make a temporary order upon a record which it fully appreciated was inadequate to support a permanent order. It also appears that the Commission, by inserting a so-called "saving clause", expected that it would thus render valid an order which otherwise would be clearly invalid. Therefore, one of the fundamental questions presented by this appeal is whether or not the decision of this Court in the *Wisconsin* case may hereafter be relied upon as warrant for such clearly arbitrary administrative action, provided a "saving clause" is contained

in the opinion accompanying the order. It is respectfully submitted that the Commission should act only when it has evidence sufficient to justify its action. It should not be clothed with authority to issue far reaching orders affecting the property rights of a great many railroads merely because it may have before it so-called typical evidence that might justify such action if all of these railroads were consolidated into one legal entity. Such a procedure, it is submitted, may amount to a gross abuse of the typical-evidence rule announced in the *Wisconsin* case. Such a procedure involves a complete disregard of the property rights of individual carriers. Such a procedure might just as well be taken without the formality of a hearing so far as it affects those carriers as to which the evidence acted upon is in no sense typical.

After all, what seems to be involved in this case is not so much the construction of Section 15 (6) as the observance of one of the most elementary and long-established rules of evidence. We refer to that simple rule which was called to the Commission's attention in the *Fla. East Coast Case* (234 U. S. 166). We do not understand that that rule has been in any way qualified or changed by the typical evidence rule announced in the *Wisconsin Case, supra.* If we are correct, it is still the law that one person cannot have his rights

determined upon evidence which, as to him, is wholly immaterial and irrelevant. The gist of this controversy is the failure of the Commission to observe that simple rule.

(b) The Financial Credit Theory.

Commissioner Daniels, in his dissenting opinion in *Missouri & North Arkansas Divisions Case*, 68 I. C. C., at 64, said:

> "But whatever the original design, the Commission's powers are rapidly coming to be regarded as an engine for the equalization of earnings and income * * * From the standpoint of applicant carriers, petitions for enlarged divisions are largely actuated by and even avowedly based upon their desperate financial needs. The response which such an application evokes may readily if unconsciously be influenced by the straits in which we find the petitioning carrier."

As startling as this comment by one of the dissenting Commissioners may seem, it is fully confirmed by the following frank announcements of the Commission itself in its final decision in this case:

> "It is impossible to avoid the conclusion that Congress intended the relative financial needs of carriers so far as these needs are legitimate and incidental to the transportation service, to be given consideration in fixing divisions; and it is just and right that this

should be so. The cost of service includes not only expenses of operation but taxes *and the proper capital charges incident to the continued functioning of the property*" (Rec. 113).

And again:

"Summing up this phase of the matter, we are of the opinion that our power over divisions is founded upon the public interest; that the carriers are mutually dependent parts of the transportation system; that the public interest requires that all essential parts be maintained so far as possible in effective working condition; that the relative amount and cost under economical and efficient management of the service rendered is a primary factor in determining the fair and equitable share of the joint revenue which each carrier shall receive; and that included in such cost is a due proportion of the burden of maintaining *the financial integrity and credit of the carrier*" (Rec. 113).

This language is unmistakably clear. It means that the Commission in passing upon the revenue needs of the New England carriers has not limited its attention as Section 15 (6) directs, to

"the amount of revenues required to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation"

but has considered their "capital charges" and the amount needed to maintain their "financial integrity and credit".

This can only mean that in fixing divisions between a road that has been conservatively financed and another road whose finances have been mismanaged and whose credit is therefore bad, the Commission asserts the right to so divide the joint revenue as to restore the credit of the latter carrier.

It is submitted, without argument, that these statements disclose that the Commission in this case has clearly gone beyond its administrative functions and has undertaken to exercise legislative powers which even Congress does not possess.

V.

A practical administration of the statute is possible without resort to the arbitrary course pursued by the Commission in this case.

The Commission's decision purports to be necessary to "a practical administration and prompt action where that is necessary in the public interest" (Rec. 118). The lower court approved of its action upon the theory that "the surrounding conditions justify a broad and comprehensive treatment" (Rec. 947) of the subject matter. Following this view the court said:

> "The act makes it the Commission's duty to find a way, despite the complexities of the

> subject, to carry out the new mandate of Congress, and makes it clear that the matter must be dealt with in a comprehensive way" (Rec. 947).

It is apparent that the expressions quoted above are loose and uncertain guides for administrative action. Every one will agree that the Commission has a wide discretion to apply the rule stated in Section 15 (6) in fixing divisions. This discretion, however, must be exercised within the rule fixed by Congress. Just as soon as administrative discretion is exercised outside of statutory authority it becomes action which is "not regulated by fixed rule of law" and becomes "arbitrary" as that word has been defined by the courts.

But, it is said, if the "broad and comprehensive treatment" applied to the divisions problem in this case is not permitted, it will then be impractical for the Commission "to carry out the new mandate of Congress" contained in Section 15 (6). An answer to this is contained in several decisions under Section 15 (6), in which the Commission has undertaken to apply the statute "comprehensively" without exercising the sweeping powers it assumed in this case.

For example: In *Pittsburgh & W. Va. Ry. Co.* v. *P. & L. E. Ry. Co., et al.*, 61 I. C. C. 272, and *East Jersey R. R. & T. Co.* v. *C. R. R. Co. of N. J., et al.*, 63 I. C. C. 80, the Commission applied Sec-

tion 15 (6) in aid of short lines, in whose interest primarily this amendment was adopted, and against a great number of defendant carriers. In passing, it may be of interest to note that the latter case was defended by this appellant on behalf of all of the defendants and the validity of the Commission's order in that case has never been questioned.

In the brief filed in the lower court on behalf of the Interveners (pp. 30-1), the decisions in these cases are interpreted as follows:

> "In *East Jersey Railroad & Terminal Co.* vs. *Central Railroad of New Jersey*, 63 I. C. C. 80, and *Pittsburgh & West Virginia Railway* vs. *P. & L. E. Railway*, 61 I. C. C. 272, the Commission adopted the principle that divisions as a whole between connecting carriers may be rectified. * * * But if it is a sound proposition as the Commission has in the cases cited above decided, that the divisions as a whole between one carrier and its connections may be revised in one decision, there can be no logical point at which the Commission can refuse to extend this principle to seven carriers who join in one petition."

This sounds plausible. Let us analyze it. In each of the two cases cited, the Commission had before it the complaint of a terminal road that the uniform deduction or allowance which was granted to it by its connections before they prorated the

balance of the rate, was inadequate. Such arbitrary deductions are the compensation commonly paid to terminal roads by their connections. They are like compensation paid to a joint agent and are wholly different from the percentage divisions which are customary between trunk lines and which are alone involved in this proceeding. They are fixed and uniform payments per 100 pounds, which by agreement among the connecting carriers (joint principals) are paid to the terminal line (agent) for its terminal service before the balance of the rate is divided on a percentage basis among such connections. What the Commission decided in those cases was that the Commission may, under Section 15 (6), on the complaint of a terminal road, order the connecting carriers to grant such terminal road an increased allowance without at the same time fixing the percentage divisions under which such connections customarily prorate the balance of the through rates. Manifestly what the Commission has undertaken to do in the present case bears no analogy to what it did in those cases. What is here involved is not the fixing of an arbitrary deduction payable to a terminal road from the joint revenue which connecting carriers prorate after such deduction upon an established percentage basis, but it is the whole percentage basis on which the through rate is divided among all of the participating carriers.

Moreover, assuming that the action taken by the Commission in the *East Jersey and Pittsburgh & West Virginia* cases was authorized by the statute, no one will contend that the Commission could consistently with elementary rules of evidence and due process of law merge into one proceeding similar complaints by a half-dozen terminal roads and then by a process of averaging together the revenue, operating and traffic statistics of the six complainant terminal roads and making another average of the operating, revenue and traffic statistics of all of the defendant roads in the six complaints, decide the six cases upon such average statistics. Such a procedure, even in cases where merely terminal allowances were involved, would be so illogical and so completely in disregard of the elementary rules of evidence to say nothing about the rule stated in Section 15 (6) that no one would seek to justify it. Still less may the complaints of six trunk line carriers participating on a percentage basis in the through rates applying via many different routes be scrambled together in one proceeding and decided upon the basis of average statistics which are wholly irrelevant as to the claim of any one of the complainants against any one of the defendants. Such a procedure has absolutely nothing to justify or commend it except that, if the law permitted, it would present a convenient method by which the Commission might dispose

of divisions cases upon a wholesale plan, but, while trite, it seems appropriate to recall that "the convenience of Commission or Court is not the measure of justice" (*I. C. C.* vs. *Stickney*, 215 U. S. at 109).

Furthermore, the Commission, without resorting to the extraordinary construction of Section 15 (6) announced in this case, has administered the statute comprehensively in the *Missouri & North Arkansas Divisions Case*, 68 I. C. C. 47. In that case the complaint, brought by a railroad 364 miles in length, attacked the percentage divisions of joint rates in effect between it and its eight connections. The Commission, after an exhaustive investigation, issued an order increasing the divisions of the Missouri & North Arkansas and reducing the divisions of its several connections, but this order gave recognition to the varying claims of the complainant against the respective connecting carriers; for example, the divisions of the St. Louis Southwestern Railway were reduced one-quarter, while the divisions of the St. Louis-San Francisco Railway, the Kansas City Southern Railway, the M. K. & T. Railway Company, the Atchison, Topeka & Santa Fe Railway Company were reduced only one-fifth, and the divisions of the Yazoo & Mississippi Valley Railway and the Missouri Pacific Railroad Company were reduced only one-tenth. Without expressing an opinion as to whether or not the Commis-

sion's order in that case was valid, it demonstrates that it is entirely practical for the Commission to give consideration to the varying extent to which the several defendant carriers in a divisions proceeding are affected by the factors specified in Section 15 (6). Yet it is perfectly clear that the Commission has wholly failed to take into account these variances as between the expenses, etc., of the carriers participating in the rates which the Commission has divided in the present case.

Again, in *Kansas City, Mexico & Orient Divisions*, 73 I. C. C. 319, the Commission has given an illustration of how it is possible for it to apply a "broad and comprehensive treatment" to the problem of dividing practically all of the joint rates in which a trunk line carrier participates on a percentage basis, while at the same time observing the requirement of Section 15 (6) that in doing so the Commission shall give consideration to the pertinent facts and circumstances affecting the "respective carriers" interested. In that case the Commission was asked by the Kansas City, Mexico & Orient Railroad, which operates a line 737 miles in length, to fix the divisions of practically all of the joint rates in which it participates with 40 of the principal carriers west of the Mississippi River. When the Commission came to dispose of the case, it did not issue a blanket order against all of the defendants, as in the instant

case. Instead, it confined its order to the 13 carriers immediately connecting with the complainant, as to which the record contained some evidence. Moreover, it did not undertake to treat these 13 immediately connecting carriers as a group of corporations each of which had, in some unexplained way, become liable to make a uniform contribution to the complainant. On the contrary, the Commission held that while the Gulf, Colorado & Santa Fe Railway Company divisions should be reduced to the extent of three-tenths, the Wichita Falls & Northwestern Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Galveston, Harrisburg & San Antonio Railway Company and Chicago, Rock Island & Pacific Railroad Company's divisions should be reduced only one-quarter, and the Clinton & Oklahoma Western Railway Company's divisions should be reduced only one-tenth. We do not venture an opinion as to the validity of the Commission's order in that case. We merely point out that the order demonstrates that it is practicable in a divisions case brought by one carrier against a large number of other carriers, for the Commission to exercise a reasonable discretion so that the rights and interests of the "respective carriers" involved may be given recognition as Section 15 (6) requires.

Finally, in its second decision (Rec. p. 120) the Commission in directing the parties how they should proceed to revise divisions has given a

complete outline of a way in which, in the instant case, it might have itself undertaken to administer Section 15 (6) in a comprehensive yet lawful manner.

It is submitted that, as the above examples illustrate, Section 15 (6) can be administered in a practical and comprehensive way without treating scores of unaffiliated corporations duly organized under the laws of the several states, as if they had been completely merged into one legal entity when these corporations are distinct entities with individual property rights and Congress, with a full appreciation of the constitutional limitations upon it, has expressly directed that their respective and varying circumstances be given due consideration.

VI.

As a matter of law the Commission's order against the Central Railroad Company of New Jersey is unsupported by the evidence and therefore involves a taking of property in violation of the Fifth Amendment.

(a) Evidence essential to support such an order was wholly lacking.

There are three main gateways through which traffic jointly participated in by the Jersey Central and the several New England carriers may pass. These are—Mechanicville, Maybrook and Jersey City. The chief routes in which the Jer-

sey Central participates via these gateways are shown on Appendix B attached hereto.

(1) There was **no** evidence whatever before the Commission as to the percentage or amount of any of the divisions received by the Jersey Central out of any of the joint class rates applicable via the *Mechanicville* Gateway between points on the Jersey Central and points on the Central Vermont Railway, the Central New England Railway, the Maine Central Railroad or the Rutland Railroad.

(2) There was **no** evidence whatever as to the percentage or amount of any of the divisions received by the Jersey Central out of any of the joint class rates applicable via the *Maybrook* Gateway between points on the Jersey Central and points on the Central Vermont Railway, the Central New England Railway, the Maine Central Railroad or the Rutland Railroad.

(3) There was **no** evidence whatever as to the percentage or amount of over 95% in number of the divisions received by the Jersey Central out of joint class rates applicable via the *Jersey City* Gateway between points on the Jersey Central and points on the Central Vermont, the Central New England, the Maine Central, the Rutland, the New Haven and the Boston & Maine.

(4) There was **no** evidence as to the percentage or amount of any of the divisions received

by the Jersey Central out of any of the joint class rates applying via any of the *three gateways* between points in New England and points located upon other trunk lines connecting with the Jersey Central.

(5) There was **no** evidence tending to show that the divisions received by the Jersey Central out of any of the joint class rates participated in by it and any one or more of the New England lines were unreasonable, inequitable, or unjust to any of said New England lines.

The above broad generalizations are based upon a careful examination of the record. They are confirmed by the Ewing Affidavit (Rec. 908) and by the following findings of the Commission in its original report (Rec. pp. 83-4):

> "The evidence submitted by complainants of divisions in effect between them and the Central of New Jersey is meager, although reference was made in the amended complaint to said divisions applicable in connection with the Boston & Maine and this defendant via Mechanicville and Wilkes-Barre."

and further

> "No evidence of the reasonable and equitable measure of division other than 'as a whole' has been offered" (Rec. p. 91).

and again

> "* * * the record affords no foundation upon which might rest a valid prescription by us of divisions."

As to rates in which two or more carriers west of the Hudson River participate the defendants argue that the primary division of said rates is at or near the Hudson River and that it is not material how the Jersey Central and its trunk line connections divide their shares of these joint rates. This is a novel suggestion to which no reference is made in the Commission's opinion and which, we believe, finds no support in the record. But, in order to render the suggestion wholly immaterial, attention may be confined to rates in which the Jersey Central is the only carrier participating west of the Hudson River. As above indicated, in paragraph numbered 3, there is no evidence whatever as to the amount or percentage of the divisions of over 95% of the joint class rates applying between points on the Jersey Central and points in New England via the *Jersey City* Gateway where the Jersey Central connects directly with the New Haven and as the Ewing testimony (Rec. pp. 606-21) and affidavit (Rec. (Rec. p. 908) show, the few isolated instances in which divisions via this gateway are stated in the record are in no sense typical or illustrative of the 95% of said divisions as to which no evidence whatever was before the Commission.

The necessary conclusion is that the Commission did not have before it the amount or percentage or typical cases or any basis for determining even approximately the relative measure of

the great preponderance of the divisions of the Jersey Central with which it has attempted to deal. It seems too clear to call for argument that the Commission could not intelligently, or equitably, revise divisions when it did not know what they were. In other words, the record is absolutely lacking in evidence essential to justify the order against the Jersey Central. The Commission itself, in the present case, recognized that it could not make a lawful order in the absence of such essential evidence by holding:

> "Nor were divisions of the Bangor & Aroostook shown. *Findings cannot be made with respect to any of these divisions* * * *" (Rec. p. 114).

In an effort to make the scattering and isolated divisions in evidence before the Commission appear fairly typical, appellees have asserted without citing any evidence or authority, that the divisions as between the trunk lines and the New England carriers were, as a result of competition, practically the same via all of the gateways. That such is not the case, however, is made clear by the following finding of the Commission in its original report (Rec. p. 77):

> "There are thousands of percentage divisions between the complainants and the defendants, which are multiplied indefinitely by the number of routes over which they apply, *and they differ with many circumstances, including competitive conditions.*"

and by the reference which the Commission made in its original report (Rec. p. 93)

> "the almost total lack of the reasons which impelled the making of division via one gateway lower than via another."

That competition which, of course, equalizes rates does not as a rule tend to equalize divisions via two gateways results from the following circumstances: *First*, as the Commission pointed out in *Missouri & North Arkansas Divisions Case*, 68 I. C. C., at p. 49, the amount of traffic that is unrouted by shippers to-day is frequently negligible. In other words, since shippers now have the right to specify the routing they desire, the routing of traffic is to a very great extent dictated by the shipper who is greatly interested in the rate, but who neither knows nor cares what the divisions of the rate are. *Second*, in so far as the carriers are free to influence the routing of traffic, the record in this case shows that the primary consideration of each carrier is to so route traffic as to secure for itself the long haul (Rec. 397). For example, the Boston & Maine participates in joint rates from Portland, Maine, to Philadelphia, Pa., via both the Albany and the Jersey City gateways, but in the rare instances where the shipper does not specify the routing, this carrier is almost certain to forward the traffic via the Albany gateway because via that route it

gets the longer haul, and therefore under normal conditions, materially greater revenue. *Third,* the most conclusive answer to the suggestion that because of competitive influence the divisions in effect via one gateway control the divisions in effect via competing gateways is furnished by actual comparison of divisions. For example, joint rates are in effect between Boston, Mass., and Philadelphia, Pa., via the different gateways. Appendix A to the amended complaint (Rec. p. 29) filed by the New England roads with the Commission show that the fifth class rate applicable via either the *Mechanicville* or the *Jersey City* Gateway from Boston to Philadelphia is 35.5 cents. Said amended complaint also shows that via the *Mechanicville* Gateway the B. & M. receives out of this 35.5 cent rate a division of 12.1 cents while the trunk lines receive the balance, amounting to 23.4 cents, whereas via the *Jersey City* Gateway the New Haven road receives out of the 35.5 cent rate a division of 25.1 cents and the trunk lines receive the balance, amounting to only 10.4 cents. This example illustrates the rule that the bases of divisions vary widely via the different gateways and routes, so that the divisions via one route are in no sense typical of those via other routes.

If it be suggested that, nothwithstanding the complete absence of evidence as to over 95% of

the divisions of joint class rates received by the Jersey Central out of interchange traffic, yet the order is valid because the opinion accompanying it leaves the Jersey Central free to apply to the Commission for special relief, the answer is that such a sweeping and unwarranted order cannot be so justified, for, as this Court in *Wisconsin Rate* Case (*supra*), held,—

> "Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. *In such a case, the saving clause by which exceptions are permitted, cannot give the order validity.*"

The conclusion is that (1) since there was no evidence before the Commission as to any of the Jersey Central divisions applicable via most of the routes involved, (2) since the argument that divisions via one gateway for competitive reasons control and therefore fairly represent divisions via all gateways is wholly unsupported and unsound, and (3) since the fragmentary evidence submitted as to a trifling number of isolated divisions was in no sense typical of divisions via even one route or gateway, there was lacking evidence absolutely essential to support a valid order against the Jersey Central.

(b) The Evidence on which the blanket order rests is wholly immaterial and irrelevant as to the Jersey Central.

Notwithstanding the manifest absence of essential evidence to justify the order, the opinion of the lower court stresses the fact that the Commission had before it a voluminous record upon which to "draw inferences not obvious to others" and concludes that it cannot be said that the Commission proceeded without any evidence to support its order. It seems obvious, however, that the mere fact that the Commission in a proceeding involving over six hundred carriers may have had voluminous data before it, did not justify it in issuing an order against the Jersey Central, if (*a*) it was wholly lacking in essential evidence on which to base such an order, and (*b*) it made its findings and order upon data in no way relevant or material to the divisions in which the Jersey Central is interested.

The attention of the Court is now invited to the fact that the order of the Commission is based solely upon findings of fact arrived at by comparing the group statistics of the New England carriers with the group statistics of the roads west of the Hudson River and that, while there may have been some evidence to support these findings as to the two groups compared, they are wholly immaterial and irrelevant, and grossly unrepresentative and misleading for the purpose of testing the reasonableness of the ex-

isting divisions between the Jersey Central and any one of the New England carriers.

For example, the chief finding on which the Commission based its order is as follows:

> "*Complainants perform their part of the interchange service under less favorable conditions than their connections west of the Hudson River.* They are terminal lines; their hauls are short; their traffic splits at different junction points and is diffused over many secondary and branch lines; their train loads are therefore relatively light; the density of their freight traffic is relatively low; and while their investment per mile of road is low, their investment per revenue ton mile is relatively high" (Rec. p. 113).

In support of the finding shown in italics the Commission cites group statistics. As we shall now see, the uncontroverted evidence before the Commission, instead of supporting this finding, so far as the Jersey Central is concerned, demonstrates just the reverse.

The favorite argument of the New England carriers in the proceeding has been that they are essentially terminal roads having short average hauls and that since the existing divisions were agreed upon terminal costs have increased faster than road haul costs, with the result that the operating expenses of the New England carriers have increased faster than those of the trunk lines.

Professor Cunningham, one of the chief witnesses who testified for the New England lines before the Commission has furnished a conclusive answer to this so far as the Jersey Central is concerned. As he admitted on cross-examination, assuming this argument to have force as applied against the Trunk line carriers as a group, then since the Jersey Central is more of a terminal carrier than any one of the New England roads, it follows that as between the Jersey Central and the New Haven, or any other New England carrier, the Jersey Central has been more prejudiced by the uneven increase in operating expenses since the existing divisions were agreed upon than has the New Haven. Professor Cunningham's testimony was as follows:

> "Mr. Elder: Just to illustrate it,—Of course you appreciate as I do that you cannot draw a conclusion from any one factor. There are a great many elements that you have to take into account in making any comparison between two roads; but, accepting your reasoning that the New England roads are handicapped because their average haul is shorter than that of the roads west of the river as a group, if that argument have any force, it must also be true, must it not, that since the average haul of the Jersey Central is only about seventy miles, whereas the average haul of the New Haven is something over one hundred miles, therefore the Jersey

Central has been more prejudiced by the increase in terminal costs of the last fifteen years than has the New Haven for example?*

"Professor Cunningham: I think that is a fair statement.

"Mr. Elder: If that be so, if the Commission comes to the point in this proceeding, of trying to determine whether or not the relative costs of the New Haven and the Jersey Central on traffic interchanged between them and originating and destined on these two lines, have so changed in the last fifteen years as to prejudice one of the parties, then the conclusion from your argument is that it is the Jersey Central that has been more prejudiced by the trend of costs during these fifteen years?

"Professor Cunningham: I think that reasoning is sound.

"Mr. Elder: If that reasoning be sound, then in the same fashion that the New Haven is asking the Interstate Commerce Commission to require the roads west of the river to increase its divisions because of the alleged fact that terminal costs have increased more in the last fifteen years in New England than

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* That relative average haul, in the Commission's judgment, is a significant test in comparing the relative operating costs of two carriers is shown by the following finding in *Missouri & North Arkansas Railway Divisions Case*, 68 I. C. C., at 60:

"Among the facts and circumstances which would ordinarily entitle one carrier to a greater or less proportion than another carrier of a joint rate, fare, or charge, *one of the most important* is the average length of haul. The effect of relative length of haul on relative costs of transportation has long been recognized. *Shepard* v. *N. P. R. R. Co.*, 184 Fed. 765; *B. of T. of Troy* v. *A. M. Ry. Co.*, 6 ICC, at 23; *N. P. Ry. Co.* v. *Keyes*, 91 Fed. 47."

> west of the river, the Jersey Central would have grounds, would it not, to file a complaint with the Commission, asking that for the same reason, the divisions which it receives on traffic interchanged with the New Haven, should be increased rather than reduced?
>
> "Professor Cunningham: The logic is sound" (see Rec. p. 378).

Moreover the uncontroverted evidence before the Commission established that the Jersey Central, as compared with the New Haven or the Boston & Maine or the New England Carriers as a group (1) has a slower average train speed per hour, (2) the same or a smaller number of car miles per car day, (3) a larger percentage of yard switching locomotive miles, (4) a larger proportion of freight stations to miles of road operated, (5) a much larger percentage of yard track and sidings to total main track mileage, and (6) a much larger percentage of empty car mileage to total car mileage. As these comparisons and others, shown in Appendix A attached hereto, make clear, the Jersey Central performs its part of the interchange service with the New England roads under more costly and less favorable conditions than do any of the New England carriers.

In the same connection, the Commission gives emphasis to the fact that the New England carriers are further removed from their fuel supply than the trunk lines. Obviously, however, the

cost of coal is merely one of a great number of items entering into the total operating expenses of a carrier. It follows that a comparison of the relative increase in total operating expenses is much more significant than a comparison of the relative increase in the mere cost of fuel. The uncontroverted evidence shown in the following table demonstrates that, taking into account the increase in total operating expenses (including increases in the cost of coal), the Jersey Central during the past five or six years has experienced a greater relative increase in its operating expenses than has either the New Haven or the Boston & Maine.

RELATIVE OPERATING EXPENSES.

Road.	Annual Avge. 6-30-1914 to 6-30-1917(*)	1918(†)	1919(†)	First 10 Mo. 1920(‡)
CRR of NJ.....	$21,253,848(§)	$36,369,271	$40,273,951	$44,044,451
NYNH & H.....	50,639,926	87,746,523	92,473,381	103,106,029
Bos. & Me.....	39,419,173	64,430,772	66,023,668	73,740,928

(*) Exhibit 24.
(†) Exhibit 127.
(‡) Exhibit 125.
(§) Willard Exhibit 9 in *Ex-Parte* 74, referred to in Exhibit 24.

The other main finding on which the Commission's order is based is that during the past 3 or 4 years the expenses of the New England carriers owing to their special characteristics have increased in greater proportion than those of their western connections and that therefore,

> "the scales which formerly hung approximately level as between the participating

> carriers are now tipped against the New England roads and in favor of their western connections because of the disproportionate results of these charges" (Rec. p. 115).

In support of this finding the Commission cites group statistics purporting to show the relative "financial needs" of five of the New England carriers grouped together, compared with 32 of the roads west of the Hudson River grouped together. From these statistics the Commission concludes,

> "It is a fact generally conceded that *as a group* they are in greater financial need than any other *group* of important carriers in the country" (Rec. p. 116).

The statistics cited by the Commission are taken from Exhibit 111 and are as follows:

STATEMENT SHOWING THE RATIO OF NET RAILWAY OPERATING INCOME TO PROPERTY INVESTMENT.

Roads Compared	Fiscal Year 1917	Calendar Year 1919	Ten Months 1920
5 New England Roads.....	5.68	1.02	3.10(*d*)
32 Eastern carriers.....	5.63	1.84	.92(*d*)

(*d*) Deficit.

The same exhibit from which the above figures are quoted shows the following data for the Jer-

sey Central as compared with each of the 5 New England carriers shown in the exhibit.

Roads Compared	Fiscal Year 1917	Calendar Year 1919	Ten Months 1920
CRR Co. of N. J.	9.46	.49	3.21(*d*)
NEW ENGLAND ROADS			
NYNH & HRR.	6.58	1.52	2.49(*d*)
Bos. & Maine.	4.59	1.42	3.64(*d*)
Cent. New England.	5.79	1.19(*d*)	3.01(*d*)
Maine Central.	5.51	2.43(*d*)	3.49(*d*)
Rutland	5.06	.89	.50(*d*)
Total New Eng. Rds.	5.68	1.02	3.10(*d*)

(*d*) Deficit.

As the above table demonstrates, the financial condition of each of the carriers compared became progressively worse from 1917 at least up to November, 1920, but that of the Jersey Central progressed downward to a much greater extent than did that of any one of said New England carriers. Clearly the Jersey Central suffered much worse than either the New Haven or the Boston & Maine as a result of the increasing trend of operating costs between 1917 and 1920, yet the Commission wholly ignored this uncontroverted fact and based its order upon statistics that have no relevancy whatever to the Jersey Central.

The Commission's opinion makes no reference to the relative taxes paid by the carriers, but the statute requires this factor to be given "due consideration" and the uncontroverted evidence (Exhibit 207) shows the following data regarding taxes paid by the Jersey Central as compared with those paid by the New England carriers.

RELATIVE TAXES FOR YEAR 1919.

	CRR of NJ	N.Y.NH & H.	Bos. & Me.	New England Rds.
Percentage of taxes to gross revenue.	6.91	3.82	4.27	4.02
Taxes per mile of road operated.....	$4,513	$2,072	$1,299	$1,306

The point we seek to emphasize by calling attention to the above facts is that while the Commission based its order upon findings as to the *New England group* of carriers as compared with the *trunk line group*, even though such *group* findings have some evidence to support them, they are irrelevant and immaterial evidence as against any one of the petitioners herein. Furthermore, so far as the Jersey Central as compared with the individual carriers is concerned, there was not only a complete absence of evidence to support the above findings, upon which the order rests, but on the contrary **the uncontroverted evidence relating to the Jersey Central proves just the reverse of the conclusions upon which the Commission has acted.** In other words, by undertaking to deal with the divisions between the Jersey Central and the New Haven in the light of immaterial and irrelevant group statistics, the Commission finds that the divisions of the Jersey Central should be reduced and that those of the New Haven should be increased, whereas **the uncontroverted evidence before the Commission which was relevant and material as to the Jersey Central and the New Haven shows that**

the divisions of the Jersey Central should be increased and that those of the New Haven should be reduced.

The contention of the Jersey Central is that the group statistics upon which the Commission has acted are wholly irrelevant as to it. Its further contention is that the Commission in disregard of the express direction of the statute has arbitrarily ignored the material evidence relating to the *respective* operating expenses, taxes, revenues, etc., of the Jersey Central as compared with those of the several New England carriers. The result is that the order of the Commission so far as it purports to affect the Jersey Central is without competent evidence to support it and is wholly arbitrary in character.

It is submitted that the Commission has proceeded in this case very much as it did ten years ago in the so-called Florida East Coast Case. In that proceeding the Commission was asked to fix the rates on citrus fruits, etc., from Southern Florida to northern points. It had before it considerable evidence regarding the transportation of such traffic over the Atlantic Coast Line and the Seaboard Air Line Railways. As to the Florida East Coast Railway there was merely sufficient evidence to show that its operating conditions were different from those of the two carriers above named. The Commission, confining its attention to the evidence affecting the Atlantic

Coast Line and the Seaboard Air Line, made an order fixing the rates not merely for those two carriers, but also for the Florida East Coast. The latter carrier contested the order and this Court in *Florida East Coast Railway Co.* vs. *U. S.*, 234 U. S. 166, set the Commission's order aside for reasons aptly summarized in the headnote, which reads as follows:

> "In a proceeding against several carriers, testimony as to the condition of the traffic on certain railroads does not tend to establish conditions on another railroad in regard to which no testimony is given and where the record shows essential differences between it and those roads in regard to which the testimony was given."

The order of the Commission in the present case is perhaps more arbitrary than the order set aside in the Florida East Coast Case because the order of the Commission here is not warranted as against any one of the appellants. The Commission in the present case has not applied the evidence regarding one carrier in deciding an issue solely relating to another; it has instead, taken the statistics regarding a great number of carriers and resolved them into group averages which do not represent the real facts as to any particular carrier and are therefore not proper evidence as against any one of the petitioners.

From the above review of the record the conclusion seems necessary that (1) evidence indispensable to support the order against the Jersey Central was wholly lacking, and (2) the evidence upon which the order purports to be based, however significant it may be for rate making purposes or in a study of comparative territorial operating costs, is wholly immaterial and irrelevant as to the Jersey Central or in the fixing of equitable divisions between the Jersey Central and any one or more of the New England carriers. If this reasoning is sound, then it follows that the Commission's order was arrived at without observing due process of law and therefore involves a taking of property in violation of the Fifth Amendment.

VII.

Conclusion.

The above discussion, it is hoped, demonstrates, *first*, that the order of the Commission is based upon a wholly unwarranted and unsound construction of the law, and *second*, that said order is wholly unsupported by the evidence under any proper construction of Section 15 (6).

The psychology underlying the Commission's Order appears to have been as follows: *First*, The Commission was greatly impressed with the fact that certain of the New England roads because

of their general financial condition and poor credit, badly needed money. *Second*, The Commission decided, as shown in its original report, that it could not, upon the record before it, issue a permanent order against any of the defendants, upon any possible construction of Section 15 (6). *Third*, Confronted by this situation the Commission decided to issue a temporary Order with a so-called "saving clause", relying upon (*a*) its group theory, (*b*) its financial needs theory, and (*c*) one paragraph of the typical-evidence rule stated by this court in the *Wisconsin* case (*supra*). It is submitted that in so doing the Commission erred thrice. The resulting Order, however benevolent to the New England carriers, is arbitrary and unlawful as it affects the appellants. If such action were lawful, as this Court held in *I. C. C.* v. *L. & N. R. Co.*, *227* U. S. 88:

> "It would mean that where rights depended upon facts the Commission could disregard all rules of evidence and capriciously make administrative findings by administrative fiat. Such authority however beneficently exercised in one case could be injuriously exerted in another; is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power."

In disposing of the fundamental question involved, the public interest may be given control-

ling weight, only provided the constitutional rights of the parties are respected. But waiving, for the moment, the question of private rights, what disposition of this case does the public interest demand. After an unusually extended investigation and study of the railroad problem of the nation, Congress decided that it was in the public interest that the railroads continue under private ownership and operation, subject, however, to complete Federal regulation. In reaching this decision, Congress painstakingly weighed the many advantages and disadvantages of private ownership as compared with Government ownership. With all of the arguments before it, it decided in favor of private ownership of railroads. In so deciding, it must be persumed to have had in mind the legal guarantees upon which private ownership is absolutely dependent. These guarantees were adverted to by this Court in *Lake Shore & Michigan Southern Rwy. Co.* v. *Smith*, 173 U. S. at 690, as follows:

> "A railroad company, although a *quasi* public corporation, and although it operates a public highway, *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Lake Shore &c. Railway* v. *Ohio*, 173 U. S. 285, 301, has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth* v. *Ames*, 169 U. S. 466, 544. A

> corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Smyth* v. *Ames*, 169 U. S. 466, 522, 526. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

It follows that the appellees in this case are but insisting upon the recognition of rights on which the whole success of the policy, which Congress has adopted in the public interest, depends. Unless the fundamental rights, upon which the continued private ownership of railroads is dependent, are to be recognized, then the only course fair to the owners of railroad property is to abandon the present experiment so that the complete measure of public control implied in the Commission's Order may be exercised. This must be so, because if Orders of this character may be justified by the alleged necessity for "comprehensive treatment" of joint revenue to the end that weak roads may be sustained "in the public interest", it will be but a short time before roads like the Jersey Central, which have demonstrated that private ownership and operation can provide efficient and economical railroad service, will be reduced to the dependent condition of the improvident or weak roads that are now ap-

pealing for aid in the public interest. This would mean that the owners of such efficient roads would have a substantial part of their property taken for public use without compensation. It would also mean the final failure of private ownership and operation, and, therefore, of the basic policy underlying the whole Transportation Act.

Respectfully submitted,

ALEXANDER H. ELDER,
For The C. R. R. Co. of N. J., Appellant.

December 30th, 1922.

143 Liberty Street,
New York, N. Y.

BANGOR AND AROOSTOOK RAILROAD COMPANY ET AL. *vs.* A
I. C. C. Docket
COMPARATIVE STATISTICS OF THE CENTRAL
THE NEW YORK, NEW HAVEN AND HARTFORD RA
AND THE NEW ENGLAND RAILROADS, GROUPED FOR CA

Item	Central Railroad of New Jersey	New York New Haven and Hartford	
SERVICE:			
1. Miles Operated	685	1 966	
2. Average Miles Hauled	69.83	113.69	
3. Ton Miles Revenue Freight "thousands"	2 478 352	3 168 978	
4. Net Ton Miles Per Loaded Car Mile	33.1	23.0	
5. Average Train Speed "Miles Per Hour"	8.9	10.0	
6. Percentage of Empty Car Miles to Total Car Miles	38.10	24.30	
7. Percentage of Total Freight Switching to Road Locomotive Miles Freight	83.16	86.00	
8. Percentage of Yard Switching Locomotive Miles to Total Locomotive Miles	24.69	18.96	
9. Percentage of Gross Ton Miles to Engine Rating Ton Miles	78.6	72.6	
TAXES:			
10. Percentage of Taxes to Gross Revenue	6.91	3.82	
11. Taxes Per Mile of Road Operated	$4 513	$2 072	
EQUIPMENT AND FACILITIES:			
12. Property Investment, including Material & Supplies	$146 480 820	$378 362 822	
13. Investment Per Mile of Road Owned	$240 172	$188 857	
14. Freight Cars Owned	28 162	35 537	
15. Freight Cars on Line Daily	24 260	36 498	
16. Freight Car Excess or Deficiency	Ex. 3 902	Def 961	
17. Cars Owned Per Million Ton Miles of Freight	11.36	11.21	
18. Car Days Per Million Ton Miles of Freight	3 573	4 204	
19. Demurrage Assessed Per Million Ton Miles of Freight	137.21	252.74	
20. Car Miles Per Car Day	13.5	13.5	
21. Average Tractive Power Per Locomotive	29 971	28 870	
22. Number of All Freight Stations	301	704	
" Average Miles between Stations (All Stations)	2.26	2.79	
" Number of Agency Stations	163	650	
" Average Miles between Agency Stations	4.10	3.00	
" Percent of Agency Stations	54%	92%	
23. Percentage of Yard Track and Sidings to Total Main Track Mileage	84.84	45.80	
24. Percentage of Switching Track to All Track Operated	46.27	34.34	
GENERAL RESULTS:			
25. Average Revenue Per Ton Per Mile "in mills"	13.20	15.57	
26. Average Freight Revenue Per Ton "in cents"	92.2	177.1	
27. Average Revenue Per loaded car "in dollars"	30.51	40.71	
28. Operating Ratio during Federal Control Period	87.5	87.6	
29. Operating Ratio, first ten (10) months of 1920	105.28	99.99	
30. Operating Ratio—September, 1920	81.28	88.10	
31. Operating Ratio—October, 1920	89.55	91.18	
32. Operating Ratio—November, 1920	93.63	96.41	
33. Percentage of Net Operating Income to Property Investment, first ten (10) months of 1920	* Def 3.21	Def 2.49	

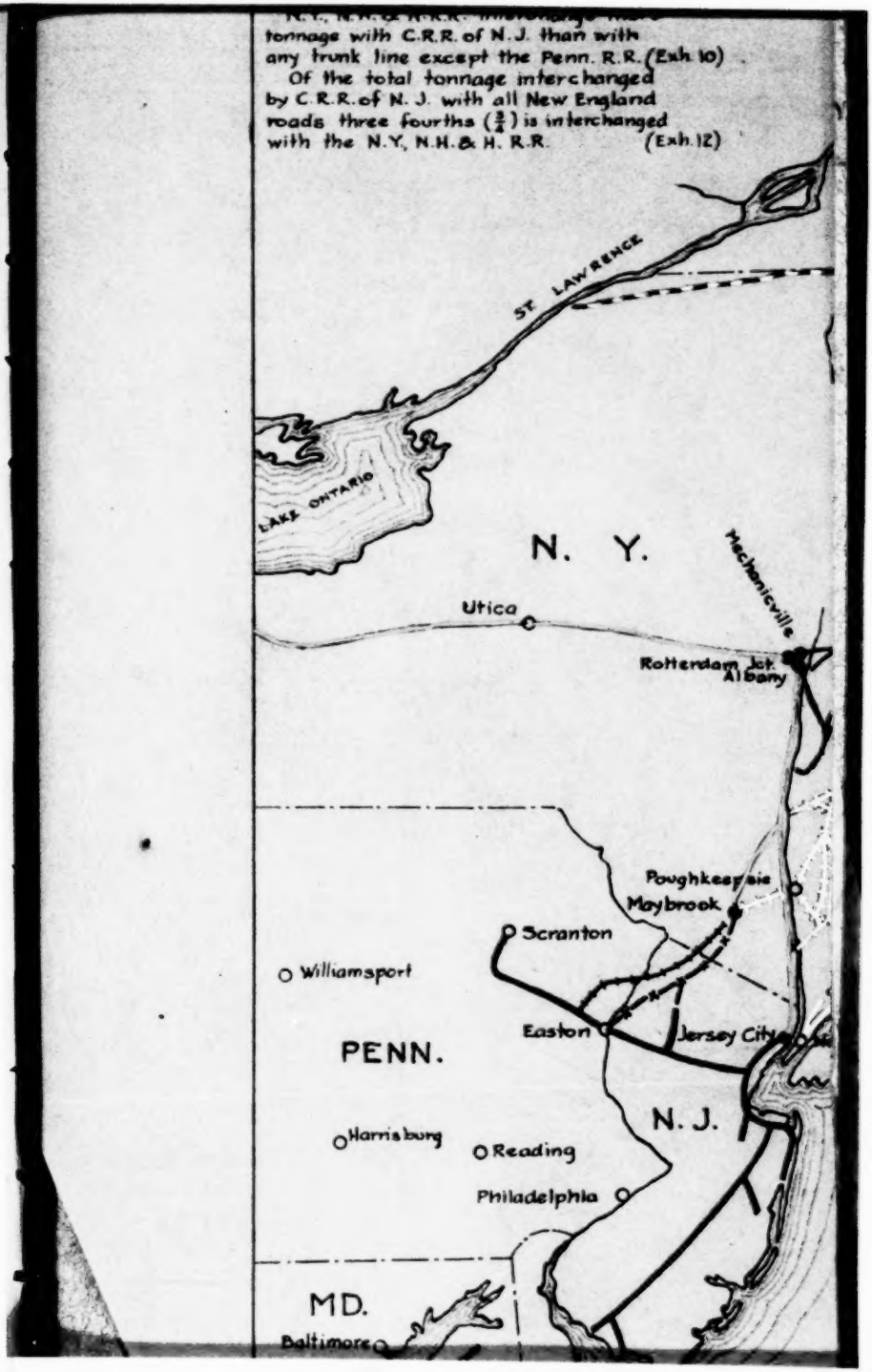
Def.—Denotes Deficit. * The statistics under the heading "New England Roads" are as shown in the

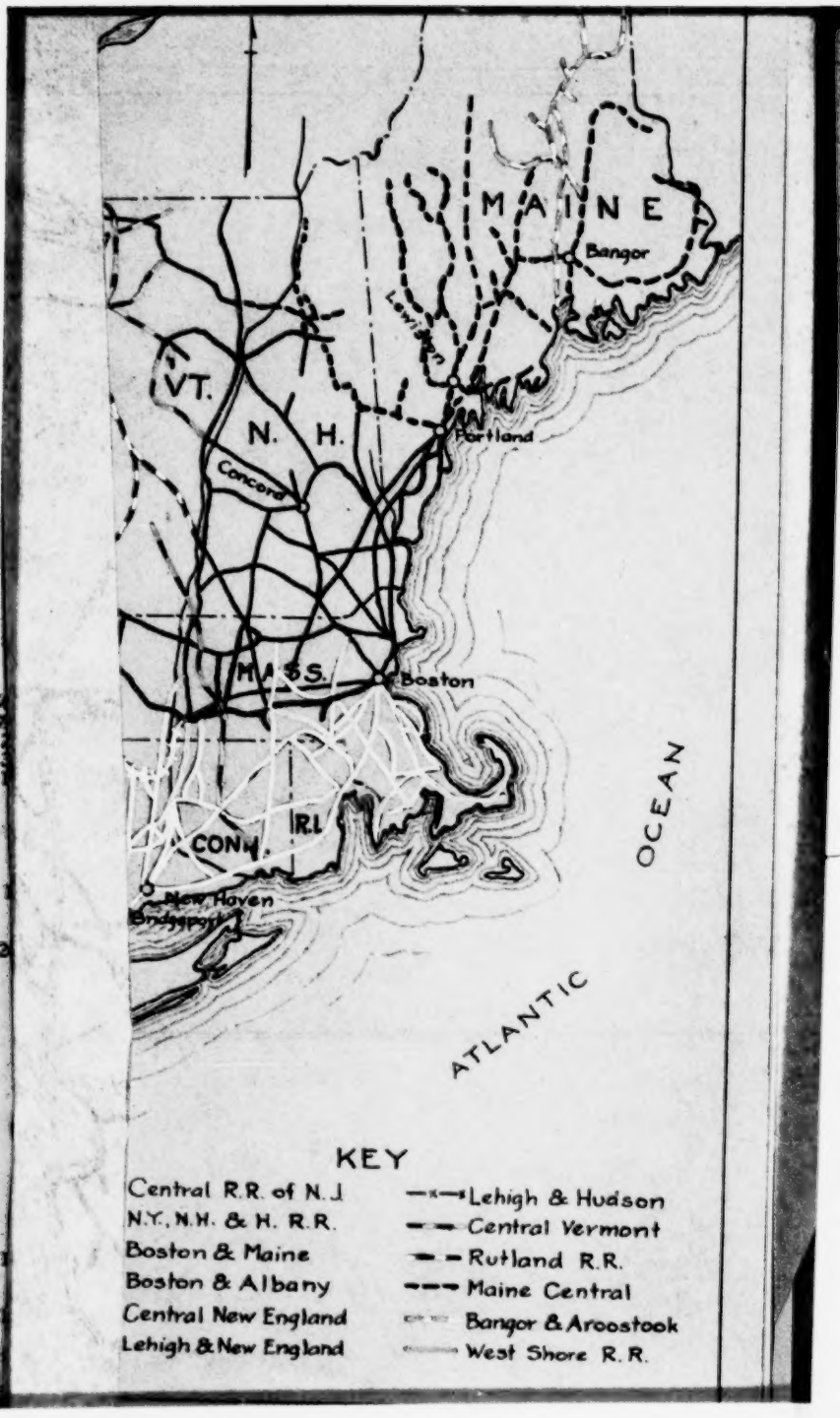
ix A. Defendants Exhibit No. 207

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.
et No. 11756
AL RAILROAD COMPANY OF NEW JERSEY,
AILROAD, THE BOSTON AND MAINE RAILROAD
ALENDAR YEAR, 1919, EXCEPT AS OTHERWISE NOTED.

Boston and Maine Railroad	New England Roads	Source of Information
2 376	7 614	Cunningham Exhibit No. 16
124.20	112.19	Hildum Exhibit No. 114
3 405 790	9 057 819	Cunningham Exhibit No. 29 O. S. 8 B for C. R. R.
23.3	23.5	Cunningham Exhibit No. 21 O. S. 5 for C. R. R.
10.5	10.4	Cunningham Exhibit No. 22 O. S. 1 for C. R. R.
27.10	28.00	Cunningham Exhibit No. 21 O. S. 5 for C. R. R.
54.00	68.40	Preliminary Abstract of 1918.
18.81	17.78	Hildum Exhibit No. 116
76.7	72.9	Compiled from O. S. Form 1 for C. R. R. Williams Exhibit No. 4 for New England Roads
4.27	4.20	Annual Reports to I. C. C. 1919 } Ten New England
$1 299	$1 306	Annual Report to I. C. C. 1919 } Roads Included
40 504 801	$876 645 433	Hildum Exhibit No. 117
$96 240	$106 888	Hildum Exhibit No. 117
23 032	78 581	Annual Report to I. C. C. 1919
35 416	94 172	Annual Report to I. C. C. 1919
Def 12 384	Def 15 591	Annual Report to I. C. C. 1919
6.88	8.67	Compiled from Cunningham Exhibit 21 and O. S. No. 5 for C. R. R.
3 794	3 166	Compiled from Cunningham Exhibit 21 and O. S. No. 5 for C. R. R.
195.60	206.67	{ Ton Miles Cunningham Exhibit 21 & N. E. Demurrage Commission Report, for 1919, issued 2-9-1920
17.6	16.1	Cunningham Exhibit No. 21 form O. S. 5 for C. R. R.
26 230	27 790	Preliminary Abstract of 1918.
734	2 539	
3.23	3.00	{ Official List of Open & Prepay Stations
681	1 973	} No. 25, I. C. C. No. 1427, F. A. Leland,
3.5	3.80	{ Agent, December, 1920.
92%	77%	
55.21	42.12	Preliminary Abstract of 1918
31.39	30.64	Hildum Exhibit No. 116
13.15	13.60	Hildum Exhibit No. 113
163.2	152.5	Hildum Exhibit No. 112
38.05	35.85	Item 26 × Item 4 × Item 2
93.0	91.9	Cunningham Exhibit No. 16
102.81	101.19	Hildum Exhibit No. 125
93.95	89.76	
98 78	93.16	
110.72	98.98	
Def 3.64	Def 3.10	Hildum Exhibit No. 111

exhibits referred to and therefore are based upon the examples shown in said exhibits. Where


tonnage with C.R.R. of N.J. than with any trunk line except the Penn. R.R. (Exh. 10)
Of the total tonnage interchanged by C.R.R. of N. J. with all New England roads three fourths (¾) is interchanged with the N.Y. N.H. & H. R.R. (Exh. 12)
ST LAWRENCE
LAKE ONTARIO
N. Y.
Mechanicville
Utica
Rotterdam Jct.
Albany
Poughkeepsie
Maybrook
Scranton
Williamsport
Easton
Jersey City
PENN.
N. J.
Harrisburg
Reading
Philadelphia
MD.
Baltimore


MAINE
Bangor
Lewiston
VT.
N. H.
Portland
Concord
MASS.
Boston
R.I.
CONN.
New Haven
Bridgeport
OCEAN
ATLANTIC
KEY
Central R.R. of N.J.
N.Y., N.H. & H. R.R.
Boston & Maine
Boston & Albany
Central New England
Lehigh & New England
Lehigh & Hudson
Central Vermont
Rutland R.R.
Maine Central
Bangor & Aroostook
West Shore R.R.